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October 31, 2005

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Kim S. Aydlette, J.D.
State Director
South Carolina Department of Social Services
P.O. Box 1520
Columbia, SC 29202-1520

Re: Compliance Reviews:

State Agency (Transaction Number: 01-00438);
Region I (Transaction Number: 01-00439);
Region I Satellite Office (Transaction Number: 01-00440);
Region II (Transaction Number: 01-00441);
Region III (Transaction Number: 01-00444);
Region III Satellite Office (Transaction Number: 01-00445);
Region IV (Transaction Number: 01-00449);
Region V (Transaction Number: 01-00451);
Region VI (Transaction Number: 01-00453);
Region VII (Transaction Number: 01-00456)

Dear Ms. Aydlette:

INTRODUCTION

The Office for Civil Rights ("OCR") of the United States Department of Health and Human Services ("HHS") has completed its reviews of the adoption placement practices of the South Carolina Department of Social Services ("SCDSS"). These reviews encompassed the policies and practices of the state agency as well as all seven regional offices within the state. The subject reviews were conducted under Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et. seq.) and its implementing regulations as found at 45 C.F.R. Part 80, and the Multiethnic Placement Act of 1994, 42 U.S.C. § 5115a, as modified by Section 1808(c) of the Small Business Job Protection Act of 1996 (Removal of Barriers to Inter-ethnic Adoption), 42 U.S.C. § 620 et. seq. ("Section 1808"). The foregoing statutes prohibit recipients of Federal financial assistance from using race, color, or national origin as a basis to deny any person the opportunity to become an adoptive or foster parent or as a basis to delay or deny any child's adoptive or foster home placements.

OCR has determined that SCDSS discriminates against prospective adoptive parents and children in its care on the basis of race, color and national origin; and thus, the SCDSS adoption practices violate the rights guaranteed to individuals under Section 1808(c) and Title VI and its implementing regulations. Under 45 C.F.R. § 1355.38(a)(2), (a)(3), the Administration for Children and Families (ACF), another HHS agency, will determine if a violation of Section 1808(a) has occurred based upon the results of the OCR investigation. Because the facts and findings set forth in this letter also provide the basis for further action by ACF under Section 1808(a), OCR is sending this letter to ACF as a report of OCR's investigation in this matter. See 45 C.F.R. § 1355.38(a)(2). ACF will provide separate notification to the state, as appropriate, of its determination whether a violation of Section 1808(a) has occurred.

BACKGROUND:

To determine whether recipients of federal financial assistance operate their programs in compliance with Title VI of the Civil Rights Act of 1964 ("Title VI"), OCR has the discretion to conduct periodic reviews. (See 45 C.F.R. § 80.7(a)). Pursuant to this authority, our office initiated reviews of the adoption policies and practices implemented by both the SCDSS state office and its seven regional offices, through which SCDSS' adoption program places children. OCR's review found that the regional centers take direction from the state office in the form of training, policy directives and memos, a State Adoption Manual, and various forms that the state provides to each of the seven regions. Training on Section 1808 is a component of a three-week training at the state Child Welfare Academy attended by all new child welfare staff. OCR found little deviation among the regions with respect to the placement of children on the basis of race, color or national origin.

In conducting these reviews, OCR consulted with ACF and provided updates on the investigation. OCR obtained from South Carolina a copy of the state laws applicable to the adoption process, and also obtained a copy of the "Children, Family and Adult Services Policy and Procedure Manual" ("State Adoption Manual"). OCR made at least one visit to each Region to speak with staff and review documents. These discussions included interviews with approximately 78 Adoption Supervisors and Adoption Specialists[1]: 6 from Region I, 16 from Region II, 11 from Region III, 9 from Region IV, 6 from Region V, 18 from Region VI, and 12 from Region VII. OCR's review also included the analysis of approximately 150 files of prospective adoptive parents obtained from the state office. OCR contacted and interviewed numerous sources in the

[1] While the vast majority of OCR's interviews involved direct questioning by an OCR investigator, a small number of the interviewees were allowed to fill out interview forms by themselves, followed by brief questioning by an OCR investigator.

community who had knowledge and familiarity with the implementation of South Carolina's adoption placement program. These sources included advocates, social service agencies, adoptive parents and those who had made attempts to adopt.

OCR acknowledges the assistance provided by much of South Carolina's Adoption and Placement staff, particularly members of the civil rights unit, and those people who assisted OCR during its onsite reviews.

JURISDICTION AND STATUTORY AUTHORITY:

OCR is the agency within HHS responsible for determining compliance with the nondiscrimination requirement of Title VI and Section 1808(c). Pursuant to 45 C.F.R. § 80.7(a) of the Title VI regulations, OCR is authorized to conduct periodic compliance reviews of the practices of recipients of Federal financial assistance from HHS to determine whether their programs and activities are being conducted without discrimination on the basis of race, color, or national origin. SCDSS receives Federal financial assistance from HHS, and therefore it must comply with Title VI and Section 1808(c). OCR has jurisdiction to ensure SCDSS compliance with those laws.

ISSUE:

The issue addressed during the course of the subject reviews was as follows:

> Whether the adoption policies, procedures, or practices of SCDSS Adoptions cause placement determinations to be delayed or denied, and/or deny to any person the opportunity to become an adoptive or foster parent, on the basis of race, color or national origin of the children and/or prospective parents involved, as prohibited under Section 1808(c), Title VI and implementing regulations at 45 C.F.R. §§ 80.3(a) and 80.3(b)(l).

DISCUSSION OF THE LAW AND EVIDENCE:

A. Legal Framework—Title VI

Title VI was enacted as part of the Civil Rights Act of 1964. Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Among other things, Title VI's implementing regulations prohibit:

1. Subjecting an individual to discrimination on the basis of race, color or national origin;

2. Denying an individual any service or other benefit on the basis of race, color, or national origin;

3. Providing services to an individual in a different manner on the basis of race, color or national origin;

4. Restricting an individual on the basis of race, color, or national origin in the enjoyment of any advantage or privilege enjoyed by others;

5. Treating an individual differently on the basis of race, color, or national origin in determining whether the individual satisfies any requirements or conditions in order to be provided any service or other benefit;

6. Affording an individual an opportunity to participate in a program that is different from the opportunity afforded others under the program on the basis of race, color, or national origin; and

7. Utilizing methods and/or selection criteria which have the effect of subjecting individuals to discrimination on the basis of race, color, or national origin.

See 45 C.F.R. §80.3(a); 45 C.F.R. §80.3(b)(l)(i); 45 C.F.R. §80.3(b)(l)(ii); 45 C.F.R. §80.3(b)(l)(iv); 45 C.F.R. §80.3(b)(l)(v); 45 C.F.R. §80.3(b)(vi); and 45 C.F.R. §80.3(b)(2).

Title VI forbids decision-making on the basis of race, color or national origin unless the consideration advances a compelling governmental interest. In the context of adoption and foster care placements, the only compelling governmental interest that lawfully permits decision-making based on race, color or national origin is protecting the "best interests" of the child who is to be placed. Moreover, the consideration must be narrowly tailored to advancing the child's interests and must be made as an individualized determination for each child. A child welfare agency may take race, color or national origin into account only if it has made an individualized determination that the facts and circumstances of the specific case require the consideration of race, color or national

origin in order to advance the best interests of the specific child. Any placement policy that takes race, color or national origin into account is subject to strict scrutiny.[2]

B. Legal Framework—MEPA and Section 1808

In order to "promote the best interests of children," Congress enacted the Multiethnic Placement Act (MEPA) in 1994. MEPA decreased the length of time that children waited to be adopted; prevented discrimination in the placement of children on the basis of race, color, or national origin; and facilitated the identification and recruitment of foster and adoptive families that could meet children's needs. Pub. L. No. 103-382, § 552. MEPA prohibited recipients involved in adoption or foster care placement from categorically denying "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." MEPA also prohibited the delay or denial of child placement and discriminatory placement decisions made "solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." MEPA permitted the consideration of ethnicity or race only if it was used in conjunction with numerous factors in order to determine the best interests of the child.

In August 1996, Congress enacted Section 1808 of the Small Business Job Protection Act, Pub. L. 104-188. Section 1808 affirmed and strengthened the prohibition against discrimination in foster care or adoptive placements. Section 1808 repealed section 553 of MEPA. The repeal of section 553 had the effect of removing from MEPA the language that read, "Permissible Consideration—An agency or entity may consider the cultural, ethnic or racial background of a child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child." See Pub. L. 104-188, § 1808(d). Section 1808 also removed the language which indicated that a person or government which receives federal funding to make adoption or foster care placements may not "categorically deny" the opportunity to become a foster or adoptive parent "solely" on the basis of race, color or national origin, or "otherwise discriminate in making a placement decision, solely" on the basis of race, color or national origin. See id. Section 1808(c) reads, in pertinent part:

> Interethnic adoption:

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[2] HHS has consistently articulated its application of the "strict scrutiny" standard in adoption and foster care matters in non-regulatory guidance and other documents made available to child welfare agencies. See, e.g., HHS OCR and ACF, Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements (1995); HHS OCR and ACF, Joint Guidance to Staff on the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996 (1997); HHS OCR and ACF, Answers to GAO Questions Regarding the Multiethnic Placement Act, as Amended (1998).

(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 (42 U.S.C. 2000d et seq.).

In enacting Section 1808, Congress thus removed the bases for arguments that MEPA permitted the routine consideration of race, color or national origin in foster or adoptive placement, and that MEPA prohibited only delays or denials that were solely based on race. Section 1808 made clear that any consideration of race, color or national origin in adoption or foster care must meet Title VI's strict scrutiny standard and must be based on an individualized determination about the best interests of the child. A separate provision of the Small Business Job Protection Act, Section 1808(b), provided for financial penalties against recipients of Title IV(E) funds who violated Section 1808(a). See 42 U.S.C. § 674(d)(l). Section 1808 took effect on January 1, 1997.

In OCR's compliance review, OCR applied the elements of these statutes to all of the data gathered from SCDSS and to each of the individual families and children whose placement decisions we reviewed. In each case, OCR analyzed whether SCDSS violated Title VI and its implementing regulations. OCR analyzed whether MEPA was violated with respect to conduct that occurred between October 21,1995 and December 31,1996. OCR analyzed whether Section 1808 was violated with respect to conduct that occurred after January 1, 1997.

C. Legal Framework—Use of Strict Scrutiny

In enacting Section 1808, Congress prohibited actions that violate the rigorous constitutional strict scrutiny standard. That standard is reflected in the provision

establishing that a violation of Section 1808 is deemed a violation of Title VI.[3] Title VI itself incorporates the strict scrutiny standard. The Department's published Section 1808 guidance stresses that standard, stating unequivocally that "rules, policies, or practices that do not meet the constitutional strict scrutiny test would . . . be illegal."

Key requirements of strict scrutiny applicable to racial classifications in adoption are summarized below.

- A racial preference in adoption is inherently suspect and presumptively invalid.
- Those who support the use of racial preference have the burden of persuasion.
- To meet that burden, proponents of racial classification must show that such classifications serve an overriding or compelling governmental interest.
- The racial classification must be narrowly tailored to serve the compelling governmental interest. It may not be overinclusive or underinclusive in effect; there must be a close connection between the asserted interest and the effect of the classification.
- The proffered justification for the classification must be supported by objective evidence. The objective evidence (factual assertions) may not rest on broad racial generalizations, suppositions, or stereotypes, which correlate race with particular characteristics, attitudes, or abilities.
- Proponents of racial classification must demonstrate that there are no less restrictive race-neutral alternatives.

OCR's guidance interpreting the interplay between strict scrutiny and a child's best interests follows Congress' clear mandate prohibiting considerations of race in foster/adoption placement decisions and the Supreme Court's direction on governmental classifications based on race (See Palmore v. Sidoti, 466 U.S. 429 (1984)).

D. Previous HHS Guidance and Technical Assistance on Title VI, Section 1808 and MEPA

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[3] See 42 U.S.C.A. 1996(b) (West 1996).

In 1997, OCR and ACF released policy guidance interpreting Section 1808.[4] The guidance explained that OCR would evaluate the use of race, color or national origin in adoption and foster care placements using the rigorous "strict scrutiny standard" of Title VI, noting the "compelling governmental interest" exception. The "best interests of the child" who is to be placed is the only compelling governmental interest related to child welfare recognized by courts. On these rare occasions where race or ethnicity is a factor, considerations must be narrowly tailored to advance the interest of each individual child.

In response to requests from state, county and local caseworkers trying to understand the scope and mandate of Section 1808, OCR and ACF released more guidance to states in a question-and answer format, hereinafter referred to as the "Q&A Guidance."[5] Provisions of that guidance include:

- Any consideration of race or ethnicity must be done in the context of individualized placement decisions. An agency may not rely on generalizations about the 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 a child of another race or ethnicity.[6]

- The assessment function must not be misused as a generalized racial or ethnic screen; the assessment function cannot routinely include considerations of race or ethnicity.[7]

- Adoption agencies may not routinely assess the racial, national origin, or ethnic needs of children or capacity of adoptive parents. Any consideration of these factors must be done on an individualized basis where special circumstances indicate that their consideration is warranted.[8]

- A practice of assessing all children for their race, national origin, or ethnic needs would be inconsistent with an approach of individually considering these factors only when specific circumstances indicate that it is warranted.[9]

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[4] Memorandum from Dennis Hayahshi and Olivia Golden, "Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996" (June 4, 1997).

[5] See Department of Health and Human Services, Answers to GAO Questions Regarding the Multiethnic Placement Act, as Amended, available on the internet at www.hhs.gov/ocr/gaoreplv.htm.

[6] See Id. at questions 1 and 2.

[7] Id.

[8] Id. at questions 3, 5 and 11.

[9] Id. at question 3.

- Although agencies are not prohibited from discussing with prospective adoptive and foster parents their feelings, capacities and preferences regarding caring for a child of a particular race or ethnicity (as with discussion of other individualized issues), any consideration of race or ethnicity must be done in the context of individualized placement decisions.[10]

- Adoption agencies may not honor the request of birth parents to place their child with parents of a specific race, national origin, or ethnic group, even if the child is voluntarily removed and if the action will not delay the placement of the child.[11]

- Adoption agencies may not use race to differentiate between otherwise acceptable placements even if the action will not delay or deny the placement of the child.[12]

- A public agency is not prohibited from the nondiscriminatory consideration of culture in making placement decisions; however, a public agency's consideration of culture may not use culture as a replacement for the prohibited consideration of race, color or national origin.[13]

OCR EVIDENTIARY FINDINGS AND ANALYSIS:

OCR finds that South Carolina's policies and practices delay or deny the placement of children with adoptive parents on the basis of race, color or national origin and therefore violate Title VI and Section 1808(c). South Carolina policies and practices also deny prospective parents the opportunity to adopt children on the basis of race, color or national origin in violation of Title VI and Section 1808(c). South Carolina policies and practices include treating racial preferences of parents differently from other preferences, adding layers of scrutiny for transracial adoption, and making placement decisions on the basis of race, color or national origin. In addition, OCR finds that South Carolina violated the rights of several individuals by denying them the opportunity to adopt children or by denying children the opportunity to be adopted on the basis of race, color or national origin. In the following sections we describe these policies and practices and individual violations and explain how they violate Title VI and Section 1808(c).

1. South Carolina Adoption Practices, Which Treat Race Differently from All Other Parental Preferences, Delay the Placement of Children on the Basis of Race, in Violation of Title VI and Section 1808(c)

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[10] Id. at questions 1 and 2.

[11] Id. at questions 8, 9, 15, and 16.

[12] Id. at questions 10 and 17.

[13] Id. at question 25.

The procedures used by SCDSS staff treat the racial preferences of prospective adoptive parents differently from all other parental preferences. Although the practice of SCDSS staff is to routinely manipulate SCDSS' computerized matching procedures to alter some characteristics of children in order to generate a larger pool of prospective adoptive parents, workers never change the characteristic of race. These practices limit the options available to children and lead to delays in placement for children. OCR finds that SCDSS' practices in using prospective adoptive parents' racial preferences differently from all other parental preferences violates Section 1808(c) and Title VI.

Evidentiary Findings:

SCDSS utilizes a state-wide computer database in order to match children by race with the prospective parent's expressed preference for the race of the child(ren) the parent is willing to adopt. After each prospective parent goes through an orientation class for individuals interested in adopting, they are required to fill out a "Child Factor Checklist" (DSS Form 3008). This form identifies 78 child traits and asks parents to indicate whether they can accept these traits in an adopted child. These traits include such characteristics as bedwetting, depression, asthma, AIDS, and race. Under race, parents are asked whether they could accept children who are Black, White, Black/White or Other. The data from this checklist is entered into a state-run computer database.[14]

Regional SCDSS offices ask prospective adoptive parents for their racial preference in a child during the intake process. This classification of racial preference is required by the state through state-created intake forms (SAPRI 30101, 12/99; DSS Form 30103, 10/01). These forms request the prospective family's preference regarding the race, age, sex and number of children who may be adopted. Most regions then have a particular staff-person, called the Family Worker or Family Specialist, guide prospective parents through the rest of the adoption certification process. This process includes a careful screening for criminal history, interviews, training and a lengthy assessment process. After prospective parents are certified, they still rely on the Family Worker to answer questions and to act as their contact with SCDSS. Through this process, the Family Worker becomes knowledgeable about certified and potentially certified prospective parents within the region.

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[14] Adoption Specialists are required by the manual to update families' preferences for children and update the state computerized adoption tracking system every six months. South Carolina Department of Social Services Children, Family and Adult Services Policy and Procedure Manual, Page Reference Number 454.06 (Effective Date Aug. 1990). OCR found that workers often do not update the database or do not do so in a timely manner.

When Adoption Specialists in the region are assigned a new child and charged with finding a home for that child, the Adoption Specialists sometimes ask the regional Family Worker if the Family Worker knows of any families in the region that would be suitable for the child. Adoption Specialists may also make the same inquiry of Family Workers in other regions throughout the state. These inquiries are informal in nature and may occur over the phone or in brief emails. Due to the informal nature of these inquiries, few attributes of a child are considered—typically only race, age, sex and any serious disabilities or problems. The Adoption Specialist provides the Family Worker with the race of the child, and the Family Worker will only recommend parents as suitable prospective adoptive parents, if the parents have said that they prefer or are willing to adopt a child of that race. Thus, if the race of the child does not match the racial preference of the prospective parent, that parent will not be considered an adoptive resource for that child.

In all the regions, when an Adoption Specialist needs to locate prospective adoptive parents for a child, the Adoption Specialist will fill out the "Request for Prospective Adoptive Parents" form. This form lists only 39 of the "characteristics/problems" of the child. These include such conditions as a learning disability, AIDS, Down Syndrome, sickle cell anemia, and the following designated races: White, Black, Black/White and Other. Thus, approximately half of the traits that parents were asked to respond to on the "Child Factor Checklist" form are not actually matched against child characteristics.

The Adoption Specialist provides the Request for Prospective Adoptive Parents form to the state agency which then uses a computer program to match the listed traits of the child with the preferences of prospective parents.[15] This computer program will create a list entitled "Prospective Adoptive Parents." The Prospective Adoptive Parents list consists of prospective parents who will accept all the "characteristics/problems" that were used to describe the child in the "Request for Prospective Adoptive Parents." Thus, the computer system deselects all prospective parents from the database whose preferences do not match the listed characteristics of the child. One of the child traits that can cause parents to be deselected is the race of the child.

In the ordinary course of business, the computer-created Prospective Adoptive Parents list contains the full universe of potential parents that SCDSS chooses from. If the Adoption Specialist determines that her list of prospective parents contains an adequate number of

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[15] SCDSS policy directs adoption specialists to submit "a request for printout of available families who will accept the child's characteristics." South Carolina Department of Social Services Children, Family and Adult Services Policy and Procedure Manual Section 417, Selection of Families for Placement of Infant, No. 1 (Revised Effective Nov. 2003); Section 417.01, Selection of Families for Placement of Children Older Than 12 Months, No. 1 (Revised Effective Nov. 2003). The previous manual required staff to generate lists of prospective parents by mailing a form to the Central Intake Worker for a list of eligible families. Section 454.09.

suitable parents, she will look no further for prospective parents. To determine if parents are suitable, Adoption Specialists will examine the home study assessments and other relevant information in the files of the listed prospective parents. If the files are unavailable,[16] or in order to supplement the information in the file, many Adoption Specialists will call the Family Worker from the region of the prospective adoptive parent and ask for their opinion of the parent. If the list of prospective parents is large, Adoption Specialists narrow the list down to the best three to five parents before going to Placement Committee where the adoptive parent is chosen for the child. SCDSS policy directs workers to use specific criteria in selecting prospective adoptive parents for consideration by the Placement Committee, including "adoptive parent's preferences and acceptance of birth family and child factors" and "physical characteristics."[17]

If the list of Prospective Adoptive Parents is not large enough, many Adoption Specialists will make more computer runs by altering traits of the child. For example, they may list more age groups for the child. Thus, if an Adoption Specialist is seeking a family for a five year-old child, the specialist may generate a computer run for families interested in 6-to-9-year olds, as well as 1-to-5 year olds. Other Adoption Specialists will routinely change the "legal risk" factor[18] to generate a larger Prospective Adoptive Parent list. Others will change the sex of the child or lessen the severity of the child's physical or mental problems. Others will simply not list many of the child's physical or mental problems. However, SCDSS' practice is to leave the race of the child unaltered throughout this process. Nearly all Adoption Specialists said that they would not check multiple races of a child or change the child's race in order to generate more prospective adoptive parents.

If the list of prospective adoptive parents gathered from the state computer system and from the regional Family Workers is still not large enough, even after running these manipulated computer runs, most Adoption Specialists will wait a significant time and then try again, in the hopes that new parents have entered the system. Alternatively or subsequently, Adoption Specialists will actively recruit potential parents for the child. When a child's case goes to recruitment, the Adoption Specialist will prepare materials

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[16] SCDSS staff stated that often parent files were not available for them because the files were already checked out by another staff person.

[17] South Carolina Department of Social Services Children, Family and Adult Services Policy and Procedure Manual Section 417, Selection of Families for Placement of Infant, No. 3.c (Revised Effective Nov. 2003); Section 417.01, Selection of Families for Placement of Children Older Than 12 Months, No. 2.c. (Revised Effective Nov. 2003). In its Manual prior to the 2003 revision, SCDSS policy required that staff select parents for Placement Committee based on "physical characteristics" as well as "preference of the family and acceptance of background factors." (Section 486 and 454.09).

[18] The "legal risk" factor concerns children who are not yet available for adoption because the parental rights of their biological parents have not been terminated. The "risk" to prospective adoptive parents in these cases is that parental rights may not be terminated, and thus ultimately the child cannot be adopted.

describing the child. This material will be posted on the internet and may be disseminated to private adoption recruitment agencies. Even if a case goes to recruitment, the Adoption Specialist will likely continue to resubmit information about the child to the state database, in the hope that a new parent has entered the system. Throughout this extended period of resubmitting information to the state database, however, SCDSS practice does not alter the race of the child requiring adoptive placement, in order to generate a larger list of prospective adoptive parents.

OCR's interviews with SCDSS staff and review of documents confirmed that SCDSS consistently identifies a child's race as a criterion in seeking to identify prospective adoptive parents, and that SCDSS does not alter race, as it alters other child characteristics, in obtaining computer-generated lists of prospective adoptive parents for children. For example, although SCDSS staff utilized anywhere from a mere fraction to half of the 78 attributes on the "Child Factor Checklist," in seeking adoptive parents, staff always utilized the race of the child. Many staff acknowledged to OCR that SCDSS systems, which match the child's race to the parents' racial preferences, are their preferred methods for finding prospective parents. Staff reported that they rely on these methods and will usually not look further for prospective parents if one or both of these methods yield a sufficient number of acceptable families to take to placement committee. Staff confirmed that if the initial list of Prospective Adoptive Parents is not large enough, staff will resubmit a new Prospective Adoptive Parent Request form and change or omit the child factors on that form in order to obtain more names. However, staff reported that they routinely treat race differently in this process, and will not change the race of the child in order to generate a larger list of prospective adoptive parents.

Adoption Specialists who changed child characteristics to obtain a larger list of prospective parents admitted that they treated race differently. Staff acknowledged that they changed non-race characteristics when they believed such changes were necessary to find prospective adoptive parents. However, staff did not use a similar case-by-case strategy about the characteristic of race. Staff acknowledged that their practice was not to change the race of the child in order to generate a larger list of prospective parents. Staff expressed the view that prospective parents change their minds about the acceptability of child characteristics other than race, and said that the propensity of parents to change their minds justified the alteration of the child characteristics other than race.[19]

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[19] For example, a staff member told OCR that changing the non-race factors of the child was justified because "families change their minds about age and the characteristics/factors that they can accept in a child." Another staff member justified changing the non-race factors by saying, "Most parents are willing to take children with characteristics which originally they were not willing to parent. Parents change their minds." Another Adoption Specialist said she ignores many parental preferences because, "I think families need the opportunity to make that decision once they hear about the [individual] child.... I have had the situation where parents said in an assessment that they couldn't adopt a child with a problem, but once they heard about the specific child and his problems, they were willing to adopt him."

Staff offered a variety of reasons for their refusal to alter or delete a child's race when seeking prospective adoptive parents. Some said that they assumed parental attitudes about race were more immutable and less likely to change. Others assumed that preference about race was fundamentally different than a preference about age, for example, and indicated a racial bias. Staff also defended the refusal to alter the child's race to increase the list of prospective parents as necessary to cut down on placement disruption and because it "may not be in the child's best interest to remain with or be placed with a family that has stated their preference is another race." Moreover, staff stated that the families' original racial preferences would influence their decision about that family's ability to adopt transracially, including an Adoption Specialist who asserted that if a parent had initially requested a same-race child, she would never allow that parent to adopt transracially.[20]

Evidence gathered by OCR underscores how SCDSS' practice of treating race differently and less flexibly than other characteristics can serve to limit the number of prospective adoptive parents considered, and lead to delays. OCR conducted several sample "runs" in the SCDSS state-wide computer database to determine how the use of race and other factors impacts the number of potential adoptive parents. The runs confirm, as would be expected, that as more factors are listed for each child, fewer parents will be deemed as adoptive resources. The runs also confirm that the refusal to consider race as flexibly as other factors has an appreciable effect in limiting potential options. The following are examples:

- In sample run B, the child was a female, under age 1, with no legal risk. The child was listed alternately as White, Black, or with no race. The run for a White child yielded 173 prospective parents. The run for a Black child yielded 94 prospective parents. The run for a child whose race was not specified yielded 42 prospective parents.

- Sample run D was for a child 13 years old and up, female, minimum legal risk, some openness needed in family, learning disability, physical abuse, abandonment/no information, and mental illness. The child was listed alternately as White, Black, Other or with no race. The run for a White child yielded 4 prospective parents. The run for a Black child yielded no prospective parents. The run for an Other race child yielded 2 prospective parents. The run for a child whose race was not specified yielded 4 prospective parents.

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[20] This staff member claimed that she would not change any factors on a child factor checklist because she did not trust a parent's motive for changing their acceptance factors: "Initially, if families say they want a child of a particular race, sex or age, these are the factors I use when considering parents. Sometimes if parents change their minds, I believe they are feeling desperate and this raises a red flag...."

- In sample run E, the child was a 1-5 year old female, with minimum legal risk, no openness needed in family, mild emotional problems, with drug use, a learning disability, abandonment/no information, birth father raped birth mother, child's birth the result of incest and with drug use in the family background. The child was listed alternately as White, Black, Black/White, Other and no race. The run for a White child yielded 34 prospective parents. The run for a Black child yielded 19 prospective parents. The run for a Black/White child yielded 25 parents. The run for an Other race child also yielded 25 prospective parents. The run for a child whose race was not specified yielded 48 prospective parents.

These computer runs illustrate the extent to which treating race inflexibly can limit the number of potential adoptive parents for children. While inflexibility affects all children, the samples underscore how Black children are particularly affected. In each of these runs, when race was used as the determining factor in the search for adoptive parents, the hypothetical Black child had far smaller pools of prospective adoptive parents than a child identified as White or as being of "other" race. In OCR's six sample computer runs, 63% of prospective adoptive parents were automatically unavailable to Black children once the race of the child was specified.[21] The hypothetical White children in OCR's sample computer runs had access to more than twice the number of potential adoptive parents when the race of the child was identified. In the case of White children, 26% of available prospective parents were automatically unavailable when the race of the child was specified.[22] These differences are solidified by Adoption Specialists' failure and refusal to modify or delete information about a child's race when generating computer runs of parents who might be willing to adopt the child.

Analysis:

The manner in which SCDSS uses the race of children and parental preferences about race in identifying prospective adoptive parents is impermissible. SCDSS practices at the state and regional level treat race differently and treat race as the most important of the many attributes of a child. In the SCDSS regional and state-wide systems, reducing the number of factors used to describe a child increases the number of potential adoptive resources for the child. When SCDSS is faced with insufficient numbers of prospective adoptive parents for a child, SCDSS manipulates or eliminates factors in order to increase potential parents —except for the factor of race. Race is the only factor SCDSS refuses to

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[21] In OCR's sample runs, the accumulated total of prospective parents was 439. All of these prospective parents were available to a child if no race for the child was identified. When the race of the child was identified as Black, the computer runs identified a total of only 163 parents for these children.

[22] In OCR's sample runs, when the race of the child was identified as White, the computer runs identified a total of 324 prospective adoptive parents.

change or eliminate. Thus, race, which appears to be one of many factors, is actually the determining factor. SCDSS' reliance solely on race deprives children of the opportunity to be considered by a larger group of potential parents and therefore results in delay of placement. The SCDSS system, which may appear initially to be driven by parental choice, is actually driven by SCDSS' discriminatory use of race.

The evidence shows that SCDSS attaches more significance to race than all other factors used to describe children. By treating race differently than other factors, SCDSS treats a child's race as the overriding factor to be considered in matching the child with prospective parents. This overriding consideration of race violates Title VI and Section 1808(c). In addition, because the number and make-up of potential adoptive resources varies drastically when this factor is used, SCDSS' practice of giving overriding consideration to race delays the placement of children on the basis of the child's race, in violation of Title VI and Section 1808(c).

SCDSS demonstrates that it does not attach significance to half of the child attributes which parents say they cannot accept, because the Request for Prospective Adoptive Parents form completed by social workers only lists 39 of the 78 traits on the Child Factor Checklist completed by parents. Moreover, for the most part, adoption specialists only focus on the few traits that they also concentrate on when making inquiries at the regional level - the race, age, sex, number of children, and most serious disability or problem. As a matter of practice, SCDSS focuses on only five out of 78 child characteristics. Moreover, in cases where the system does not produce an adequate list of potential adoptive parents based on these few characteristics, Adoption Specialists eliminate or manipulate four of these remaining five traits to generate more potential parents.

SCDSS' refusal to eliminate or change the child's race on the Request for Prospective Adoptive Parents form treats race differently and leads to delays in adoptive placement on the basis of race. As described above, in those situations where there are insufficient prospective parents, SCDSS Adoption Specialists routinely manipulate or eliminate non-race factors to increase the pool of prospective adoptive parents. As SCDSS staff acknowledged in their interviews with OCR, many parents who originally say they would not accept a child of a certain age or sex or with a certain disability change their minds when they learn about a particular child—either because the parents never felt strongly about these attributes to begin with, because parents cannot appreciate what factors are unacceptable in the abstract, or because parents may be more open to adopting children with certain characteristics once they better understand the population of children awaiting placement. By manipulating or eliminating factors and finding parents willing to adopt a child with a characteristic the parents originally thought they could not accept, Adoption Specialists reduce the length of time that children wait for placement. In cases where there are not enough potential adoptive resources, Adoption Specialists will often wait a period of time and then run another Request for Prospective Adoptive Parents in

the hope that more parents have entered the system. This is a delay that is less likely to occur for non-race child attributes.

With race, however, Adoption Specialists do not eliminate or manipulate this trait of children when there are insufficient prospective parents, and thus they prevent children from being considered by a larger pool of adoptive resources. SCDSS practice never acknowledges the possibility that potential adoptive parents will consider children of races other than the one they checked on the Child Factor Checklist. Instead, Adoption Specialists will simply wait on a child's case and then try the state computer system again later, hoping that more parents have entered the system. When prospective adoptive parents are not available due to SCDSS' use of initial racial preferences, SCDSS' refusal to treat parental preferences in the same flexible manner as other preferences ensures that delay of placement is the only alternative.

In its defense, SCDSS claimed that its regional and State systems are designed to work as objective screening tools which discern the racial preferences of all parents and save the agency time by only considering parents for children of the race they prefer. Regional supervisors argued that the matching system is triggered by the parent's preferences, rather than the State's decision. Several Regional supervisors also defended the practice as being necessary and practical, since parents who prefer to adopt a White child will arguably never agree to adopt a Black child if given the opportunity. Thus, according to this defense, any time spent considering a Black child for such a parent would be time wasted. It is also defended as being in the child's best interests since a child needs, above all, a parent who will love and nurture her, and if a parent did not want a child who is like her to begin with, then the parent's capacity to love and nurture such a child would be in doubt, according to this argument.

SCDSS' screening system and practices constitute state action. By treating race differently from all other parental preferences and universally enforcing only this preference, SCDSS establishes its own system based on racial preference and shows state action on the basis of race. As a state action which utilizes racial classifications, the SCDSS system is inherently suspect and presumptively invalid. The practice of treating the parents' initial racial preference for a child as permanent is also a state action. The State process classifies and considers children and deselects parents on the basis of the racial or ethnic group to which children belong, rather than on the parents' individual merits or the children's individual needs. Most importantly, when faced with an insufficient number of potential adoptive parents, the SCDSS practice is to ignore parental choices for all factors except for race. Race is the only parental preference which SCDSS chooses to enforce almost universally.

The argument that the system saves time is insufficient to defend this practice. SCDSS cannot justify using racial classifications for the simple sake of its own convenience.

Moreover, creating a system which does not inflexibly rely on racial classifications would not be administratively impossible or unduly burdensome. It could be accomplished simply by calling all parents who are best able to meet the needs of a particular child without regard to the child's race or the parent's racial preferences. If a parent decides, after learning about the child's individual needs, that the parent does not wish to be considered for that individual child, the Adoption Specialist would simply not consider that parent as an adoptive resource. Such a system would add little extra burden to SCDSS. In fact, SCDSS uses this method for all factors but race, since it often ignores non-race parental preferences. Using a system which incorporates the possibility that prospective parents may change their initial preferences about the race of an adoptive child would aid in ensuring that the maximum number of qualified parents are considered for each child.

SCDSS also argued that the system is necessary to ensure that children are adopted by parents able to love them. Ensuring that a child is adopted by a parent able to love and nurture her is in the best interest of the child and thus a compelling government interest. However, SCDSS' practices are not narrowly tailored to advance that compelling interest. SCDSS does not undertake any individual assessment of children's needs or parents' abilities when it automatically eliminates potential adoptive parents from consideration on the basis of the race of the child. Just because prospective parents initially indicate on the Child Factor Checklist that they prefer a child of a particular race does not establish that placement with them would be in the best interests for a child of that race. OCR's interviews with SCDSS staff revealed that parents change their initial preference and can be the best adoptive placement for a child with characteristics different from what the parents initially preferred.

Moreover, OCR rejects SCDSS' claim that it adheres to adoptive parents' preferences regarding race because that is in the child's best interests. SCDSS does not have a policy or practice of adhering to parent preferences in any other area except for race. SCDSS' claim that it cannot properly deviate from expressed parental preferences is inconsistent with its practice on issues outside of race. Adoption Specialists focus on only a handful of the preferences in children expressed by parents. And when factors other than race are considered, SCDSS recognizes that parents may have been mistaken about their initial preference and allows parents the opportunity to amend their original decision. When race is the factor involved, however, SCDSS does not provide parents this opportunity and thus inevitably narrows the options available for children. Because SCDSS never established that preference in race is different than every other parental preference, it cannot convincingly argue that adhering to parents' racial preferences is in the child's best interests when it does not adhere to any other preference.

OCR finds that SCDSS' practices that treat race differently from all other factors in matching children with prospective adoptive parents violate Section 1808(c) and Title VI.

When SCDSS' use of race (including its refusal to change or manipulate information about the child's race) does not produce a sufficient number of potential adoptive resources for a child, SCDSS waits to resubmit the child's information at a later time, and thus delays the placement of children on the basis of race in violation of Section 1808(c)(1)(B). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). By treating race differently from all other factors, SCDSS subjects children to discrimination on the basis of race in violation of 45 C.F.R. § 80.3(a). SCDSS also treats children differently on the basis of race in determining whether they can be provided a service or benefit in violation of 45 C.F.R. § 80.3(b)(1)(v), and affords these children an opportunity to participate in the SCDSS program that is different than that afforded to others on the basis of race, in violation of 45 C.F.R. § 80.3(b)(1)(vi).

2. SCDSS' Policy and Practice of Matching Children with Adoptive Parents Based on the Racial or Ethnic Preference of the Birth Parent Violates Title VI and Section 1808(c)

Evidentiary Findings:

If an expectant mother decides to give up her child to SCDSS for adoption, the adoption agency in the region where she resides will place her child with an adoptive parent or family. During this process, SCDSS has a policy and practice of complying with the race or ethnic[23] preference of the birth mother when matching a child with prospective adoptive parents. By relying on the race or the ethnic preference of the birth mother, SCDSS takes race or national origin into account in making placement decisions and, thus, violates Section 1808(c) and Title VI.

State policy in effect during OCR's investigation required that the placement agency seek the preferences from a birth parent as to the sort of adoptive family with which she would like her child to placed.[24] The policy required the Adoption Specialist working with a

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[23] SCDSS staff and policy use the term "ethnicity" as a synonym for "Hispanic" or "National Origin."

[24] SCDSS Policy Manual provisions regarding the racial preferences of birth parents were amended in 2003. Relevant State Manual provisions obtained from SCDSS in March 2005 still direct Adoption Specialists to obtain and present to the placement committee the "birth parent's preferences, if applicable," and direct placement committees to "honor the birth parent preferences, if possible" for children younger than 12 months, but the policies no longer direct staff to specifically consider birth parent preferences regarding adoptive parents' race or ethnicity. South Carolina Department of Social Services Human Services Policy and Procedure Manual Section 417, Selection of Families for Placement of Infants, Nos. 3, 5, 6 (Revised Effective Nov. 2003); Section 417.01, Selection of Families for Placement of Children Older Than 12 Months, Nos. 2,4 (Revised Effective Nov. 2003). As of 2003, revised SCDSS policy also states that the race of a prospective adoptive family or child may only be a factor in placement if a comprehensive assessment determines that race is a "placement factor" for the child. South Carolina Department of Social Services Human Services Policy and Procedure Manual Section 417, Selection of Families for Placement of Infants, No. 6; Section 417.01, Selection Families for Placement of Children Older Than 12 Months, No. 5.

birth parent to obtain from the birth parent the "type and characteristics of the families to be considered for this child."[25] SCDSS policies regarding "openness" in adoption directed SCDSS "birth parent workers" to offer birth parents "choices" in "openness," including "requests by the birth parent for the child to be placed in a family of a particular ... ethnic origin."[26] Adoption Specialists engaged in narrowing the list of prospective parents to those who would be suitable to take to placement committee were directed to do so "keeping in mind the birth parents' preferences."[27] When presenting the child and the prospective families to the placement committee, the Adoption Specialist must present the birth parents' preferences.[28] In selecting a family, the placement committee was directed to "honor the birth parent's preferences, if possible."[29]

OCR's investigation found that these state policies were implemented by SCDSS regional offices, and that in some cases staff went beyond these requirements. Staff in all regions testified that they consider the racial or ethnic preference of voluntary birth parents when making placement decisions concerning their children. Staff acknowledged the consideration given to birth parent race or ethnic preferences and described it as one factor among many or as a "tie-breaking factor." Staff also acknowledged that the mother's racial or ethnic preference would be used to eliminate prospective families from consideration. Some defended the practice by referring to the state policy which requires that they consider the birth mother's preferences. OCR's investigation also documented that SCDSS practices went beyond using the birth mother's racial or ethnic preferences only if volunteered. In some regions, personnel affirmatively asked birth mothers for their racial or ethnic preferences.

Analysis:

The SCDSS policy and practice of giving a preference to adoptive parents who match a birth parent's racial or ethnic preference, and eliminating from consideration adoptive parents who do not, discriminates on the basis of race or national origin and violates Section 1808(c) and Title VI. Title VI and Section 1808(c) require child welfare agencies to make placement decisions independent of the consideration of race, color or national origin and independent of the biological parent's race, color or national origin preference,

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[25] South Carolina Department of Social Services Children, Family and Adult Services Policy and Procedure Manual, Page Reference Number: 450.11, Infant Background Summary (Effective Date Aug. 1990) (hereafter State Manual 1990).

[26] State Manual 1990, Page Reference Number: 450.15, Openness in Adoption. See also Id., Page Reference Number: 484, Openness in Adoption.

[27] State Manual 1990, Page Reference Number: 450.12, Placement.

[28] State Manual 1990, Page Reference Number: 450.12, Placement.

[29] State Manual 1990, Page Reference Number: 454.09, Selection of Families for an Infant. See also State Manual 1990, Page Reference Number: 406, Birth Parent Services.

unless there is a compelling governmental interest. When Adoption Specialists narrow down their lists of prospective parents by using a birth parent's racial or ethnic preferences, the state intentionally denies parents the opportunity to be considered for adoption of an infant based upon their race or national origin in violation of Title VI and Section 1808(c). In honoring birth parents' racial preferences, SCDSS denies eligible parents the opportunity to adopt infants on the basis of their race or national origin. This violates Section 1808(c)(l)(A). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). By denying parents the opportunity to adopt children on the basis of the parents' race or national origin, SCDSS subjects them to discrimination in violation of 45 C.F.R. § 80.3(a). SCDSS' action also denies these parents a service in violation of 45 C.F.R. § 80.3(b)(l)(i) and treats them differently on the basis of race or national origin in determining whether they satisfy any condition in order to be provided any service, which violates 45 C.F.R. § 80.3(b)(l)(v).

3. The Extra Layer of Scrutiny in the SCDSS Assessment Process for Transracial Adoptions Treats Parents Differently and Denies Parents the Opportunity to Adopt on the Basis of Race and National Origin in Violation of Title VI and Section 1808(c)

Evidentiary Findings:

The assessment process used by SCDSS adds an extra level of scrutiny for parents considering a transracial adoption that is not required of parents who only want to adopt a child of the same race. State policy prescribes an extra level of scrutiny for parents interested in adopting transracially as a part of their Home Study Assessments. As discussed below, this extra scrutiny discourages some parents from seeking to adopt transracially and denies other parents the opportunity to adopt transracially. The extra scrutiny is also applied by Adoption Specialists at the regional level who refuse to place children with a family transracially or will delay such placements while they scrutinize the ability of parents to adopt transracially.

In South Carolina, every parent or family who wishes to adopt a child must be evaluated for their fitness to adopt through a detailed Home Study Assessment. During the assessment process, the prospective parents are interviewed at length about their motivations to adopt, their ability to parent, and heir income, coping abilities and other factors.[30] The Home Study Assessments describe the family members in detail, down to their height, weight, hair color, eye color, race and complexion. The Home Study Assessments usually specify the race of the child that the adoptive parents would prefer. A final recommendation at the end of each Home Study Assessment usually summarizes the family's strengths and weakness and notes whether the family is recommended to

[30] See State Manual 1990, page 235, page ref. No. 495, Family Assessment.

adopt a child. Most assessments specify the age, sex and number of children for which the family should be considered as an adoptive resource. Most assessments also specify the race or national origin of the child for which the family should be considered as an adoptive resource. SCDSS' general practice was to follow the home study recommendation.

OCR's review of the home study assessments showed that the families who were willing to adopt a child transracially were regularly subjected to an extra layer of scrutiny to assess their ability to adopt transracially. Families who did not want to adopt outside of their own race or ethnicity did not undergo similar scrutiny. SCDSS policy directs persons conducting a family assessment to scrutinize families that wish to adopt transracially. The agency's manual requires a discussion of "issues related to cultural background, acceptance of child in community and by other family members."[31]

OCR's investigation revealed that SCDSS regional staff and contractors regularly implemented this policy by assessing parents interested in adopting transracially in ways that they did not assess others. This included assessing the race and ethnicity of the parents' friends, the race and ethnicity of the members of the parents' church, the race and ethnicity of the parents' neighbors, and the racial and ethnic make-up of nearby schools. Parents interested in same race or ethnicity placements were not similarly assessed. In assessing the ability of a family to adopt transracially, SCDSS or its contractor would ask a series of questions that force the prospective parent to defend their ability to nurture a child of a different race or ethnicity. Assessments were not based on any individualized analysis of a child's particular needs, or of the ability of the prospective parents to meet those needs. Rather, assessments assumed that all children of a certain race or ethnicity will have the same needs, and presumed that persons of a different race or ethnicity were not able to meet those assumed needs. In other words, the process was based on stereotypes about children and parents based on their race or ethnicity.

SCDSS' system impacted families in a variety of ways. OCR's investigation revealed that the extra level of scrutiny in the transracial assessment process deterred families from adopting transracially. Staff acknowledged that sometimes families changed their minds when required to undergo the additional assessment. In addition, Adoption Specialists stated that they would not place a child in a transracial adoption if the parents' Home

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[31] State Manual 1990, Page Ref. No.: 495, Family Assessment. The current SCDSS manual retains the policy of subjecting families interested in adopting transracially to extra scrutiny. The manual directs that family assessments address the following question: "If applicants expresses [*sic*] interest in a transracial placement, how do they plan to handle issues related to parenting a child of another race such as maintaining cultural identity and background as well as acceptance of the child by other family members and the community?" South Carolina Department of Social Services Human Services Policy and Procedure Manual Section 437.01, Foster/Adoptive Family Assessment Summary/Pre-Placement Investigative Instructions, Family Preference in a Child, Subsection XXII.H (Revised Effective July 2004).

Study Assessment did not — to their satisfaction — adequately assess the parents' ability to adopt transracially. When they felt the transracial assessments were inadequate, the Adoption Specialists would either not consider those families as a resource for the child they were trying to place or they would conduct their own assessment of the parents' ability to adopt transracially.

Analysis:

Section 1808(c) and Title VI prohibit the routine consideration of race, color and/or national origin when making foster care or adoption placement decisions. Title VI regulations specify that an agency may not treat an individual differently from others on the basis of race, color or national origin in determining eligibility for a service or benefit.[32] By adding an extra layer of scrutiny only to applicants who are interested in transracial adoption, SCDSS impermissibly utilizes race, color or national origin in its assessment and placement procedures in violation of Section 1808(c) and Title VI.

By assessing parents' ability to adopt transracially, SCDSS singles out parents who are interested in transracial adoption for additional scrutiny. Agencies may not single out applicants who are interested in transracial adoption for extra assessments, including an assessment of cultural competence, solely by virtue of the fact that they are interested in foster parenting or adopting a child whose race differs from their own. Agencies may not create a two-tiered assessment and placement decision process in which prospective parents are subjected to a more searching or intrusive inquiry solely by virtue of the fact that they wish to foster or adopt a child of a different race or ethnicity from their own. An evaluation system which assesses a parent's ability to adopt transracially evaluates applicants differently on the basis of race, color or national origin, and thus violates Title VI.

SCDSS staff defend the policy as being in the best interests of the child in order to ensure that the parent was able to help the child cope with discrimination and forge a positive self-identity. However, the fact that these questions were only asked to potential transracial adoptive parents shows that the policy is based on broad racial generalizations and stereotypes. The SCDSS policy and staff assume that the ability of a person of a different race or ethnicity is suspect by virtue of that person's race or ethnicity.

SCDSS' policy and practice of assessing parents' ability to adopt transracially denies or deters some potential parents from adopting children on the basis of race or ethnicity. When SCDSS' assessment does not recommend a parent for transracial adoption, that parent will be denied the opportunity to adopt on the basis of race, color or national origin. Additionally, the extra layer of scrutiny for parents who want to adopt transracially

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[32] 45 C.F.R. Part 80.3(b)(l)(vi).

can consist of probing questions and negative suggestions that may deter parents from adopting transracially. When describing how they assessed a parent's ability to adopt transracially, many Adoption Specialists said they confront the applicant with potential problems that could arise. For instance, applicants are asked whether their entire extended family would support a transracial adoption. Applicants are also asked about their neighbors' reactions. Staff may ask if the family is willing to switch to a different church with more diversity or whether they would be willing to move their home to a more integrated neighborhood. None of these questions is typically asked of parents who want to adopt a same-race child. This additional scrutiny can delay or deny the placement of a child on the basis of race or national origin. An evaluation process which treats similarly situated parents differently on the basis of their race or national origin subjects them to discrimination on the basis of race in violation of Section 1808(c) and Title VI.

In summary, OCR finds that SCDSS regularly required families interested in transracial placements to undertake additional steps, which subjected them to differential treatment and criteria. By imposing additional requirements on parents who expressed an interest in transracial placements, SCDSS subjected them to different treatment and standards based upon their race or national origin and the race or national origin of the children in which they expressed an interest in adopting. This different treatment was not based upon an individualized assessment of a particular child's needs and the ability of parents to meet those specific needs, but on generalized assumptions and stereotypes of parents based on race or national origin. In the Home Study Assessment process, SCDSS regularly required this extra layer of scrutiny prior to the identification and consideration of a particular child. As a result, the different requirements could not have been based on the individually assessed needs of a given child; rather they were applied based on the race or national origin of the parents and of the children in whom they expressed a general interest. In addition, even after Home Studies were approved, SCDSS staff regularly required additional justification for parents interested in transracial placements.

The application of different criteria based on race or national origin constitutes violations of Title VI and its implementing regulations, 45 C.F.R. §§ 80.3(a); 80.3(b)(l)(ii); 80.3(b)(l)(v); and 80.3(b)(l)(vi), as well as Section 1808(c). As SCDSS subjects parents to additional scrutiny, and as SCDSS denied parents the opportunity to adopt on the basis of these assessments, SCDSS denies parents the opportunity to adopt on the basis of their race or national origin and the race or national origin of the child. This policy and practice denies parents the opportunity to become adoptive parents on the basis of the race or national origin of the parent or child in violation of Section 1808(c)(l)(A). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). SCDSS' conduct violates 45 C.F.R. § 80.3(a) by subjecting the individuals to discrimination on the basis of race or national origin. The conduct violates 45 C.F.R. § 80.3(b)(l)(ii) by providing services to individuals in a different manner on the basis of race or national origin. It also violates 45 C.F.R. § 80.3(b)(l)(v) by treating individuals differently from

others on the basis of race or national origin in determining whether they satisfy conditions necessary to participate in the program. The application of different criteria also violates 45 C.F.R. § 80.3(b)(l)(vi) by affording individuals an opportunity to participate in its program that was different than that afforded to others on the basis of race or national origin.

4. SCDSS Placement Decisions Impermissibly Include Considerations of Race, Color and National Origin in Violation of Title VI and Section 1808(c)

A. SCDSS Impermissibly Uses Race and National Origin in Making Decisions About Adoptive Placement

Evidentiary Findings:

SCDSS uses race as a factor in making adoptive placement decisions. Many Adoption Specialists and Supervisors admitted that they use or would use race in making these decisions, as part of a multi-factor analysis or as the "tie-breaking" factor among families otherwise equally appropriate for a child.

OCR's investigation found that staff use the concept of race to eliminate from consideration families interested in adopting transracially. A staff person admitted: "If I have a large number of prospective parents of the same race who meet the needs of the child, then I would use race to deselect other race parents since I have enough parents of the child's race." Staff also admitted using racial considerations as the basis to seek out same-race placements in certain circumstances. For example, an Adoption Specialist told OCR that she seeks a same-race placement "if the child had never lived with parental figures of another race." Another Adoption Specialist told OCR that he had attended a training for SCDSS staff where other participants "were adamantly opposed to transracial adoption. They said they'd rather not see a Black child placed than placed in a non-Black household."

Several staff justified using race because they claim that research shows that children do better in a same-race placement. Thus, they argued that a same-race placement would be in the best interests of the child.

The practice of incorporating race into adoption placement decisions appears, at least in part, to be an outgrowth of SCDSS policy in effect during OCR's investigation. This policy stated that:

> The agency will not delay or deny a decision to seek termination of parental rights or otherwise to free a child for adoption *solely* on the basis of race, color, or national origin nor delay or deny an adoptive placement

> *solely* on the basis of race, color, or national origin of the foster/adoptive parent or the child.[33]

In interviews with OCR, some staff justified the practice of using race as a "tie-breaker" by pointing to this policy's allowance of race as a factor in adoption placement decisions.[34]

Moreover, many Adoption Specialists use race or national origin in adoptive placement decisions that staff assert are based on "culture." OCR's investigation documented that Adoption Specialists' concept of "culture" was frequently based on broad generalizations and suppositions regarding race or national origin. For example, some Specialists assumed that infant Hispanic children would grow up with a need to be raised in a Hispanic culture or that all Black infants would grow up wanting to listen to certain music. Staff also admitted that their concept of "culture" encompassed race, and that they believed that a person's race or ethnicity will partially or wholly determine their culture. Staff made statements such as "the definition of culture does involve ethnicity," and "to me, race/ethnicity is included in my concept of culture." An Adoption Specialist who told OCR that "culture includes race/ethnicity" explained her consideration of culture in placement decisions by noting that "hair is a big thing in our culture. Caucasians do things different than we do." SCDSS staff also made race-based inquiries about parents interested in adopting transracially - such as whether parents attended a multi-racial church or had Black friends - while characterizing these inquiries as based on culture. Staff made assumptions about the ability of parents to adapt to or nurture a child of a different race.

Analysis:

SCDSS' practice of taking race or national origin into account in adoptive placements violates Title VI and Section 1808(c).[35] Although staff sometimes characterized their use

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[33] State Manual 1990, Chapter 4, Introduction, page 10, No. 8 (Revised Effective Oct. 1995) (emphasis added); see also State Manual 1990, Chapter 4, Page Reference Number 401, Adoption Services for Children (Revised Effective Oct. 1995). SCDSS Policy Manual provisions regarding the racial preferences of birth parents were amended in 2004. Relevant State Manual provisions obtained from SCDSS in March 2005 do not contain a reference to the delay or denial of placement "solely" on the basis of race, color or national origin. South Carolina Department of Social Services Human Services Policy and Procedure Manual Sec. 401, Philosophy of Adoption and Birth Parent Services, Nos. 6, 11 (Revised Effective July 2004).

[34] Not all staff interviewed during OCR's investigation attempted to justify their use of race in placement decisions by referring to the SCDSS policy then in effect.

[35] Section 1808(c) repealed a provision of MEPA that had explicitly permitted agencies to 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 the child. However, even MEPA permitted race to be taken into account in placement

of race or national origin as one of a number of factors or as a "tie-breaking" factor, the decisions that result from this practice are decisions based on race or national origin. Moreover, these placement decisions are made in the absence of individualized assessments establishing that consideration of race or national origin is in the best interests of an individual child.

Some SCDSS Adoption Specialists and Supervisors defended taking race or ethnicity into account by referencing studies that staff said suggest that children of color will need to establish a sense of racial identity in their adolescence and that parents of the same race will be better equipped to instill in them a sense of their racial identity and pride. While we are aware of no study that conclusively establishes this position, we are aware of studies that have rejected this view;[36] and in any case, these types of facial race-based assumptions are rejected by Title VI, MEPA and Section 1808(c). South Carolina is prohibited from making and acting on these broad generalizations. It may consider race, color, or national origin in making placement decisions only when an individualized assessment of the child finds that consideration of these factors is truly in that particular child's best interests. South Carolina is also prohibited from basing placement decisions upon the general assumptions, characterizations and stereotypes of parents based on their race, color or national origin.

In taking race or national origin into account in placement decisions, SCDSS denies parents the opportunity to become adoptive parents on the basis of the race or national origin of the parent or child in violation of Section 1808(c)(l)(A). SCDSS also denies the placement of children on the basis of race or national origin, in violation of Section 1808(c)(1)(B). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). Moreover, using race or national origin as a tie-breaker or seeking same race placements favors one person over the other on the basis of race or national origin and therefore subjects the person who is not favored to discrimination on the basis of race or national origin in violation of 45 C.F.R. § 80.3(a). Using race or national origin as a tie-breaker or seeking same-race placements also denies prospective parents and children a service or benefit on the basis of race or national origin in violation of 45

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decisions only if, in a particular case, the State or other entity could show that considering the race of the child or prospective adoptive parent was in the best interests of the child. Under MEPA, race-based distinctions were subject to "strict scrutiny," as they are under Title VI. Section 1808(c), in repealing MEPA's "permissible consideration" language, underscored Congress' intent to make illegal routine consideration of race in placement decisions.

[36] Rita J. Simon and Howard Altstein, "The Relevance of Race in Adoption Law and Social Practice," 11 Notre Dame J.L. Ethics & Pub. Policy 171 (1997) (summarizing all studies done of transracial adoption over the last 20 years by concluding, "the data show unequivocally that transracial adoptions serve the children's best interest. No empirical work has been reported that contradicts that generalization."). See also Richard Barth and Marian Berry, Adoption and Disruption 3-35 (1988) (reporting that transracial placements were no more likely to disrupt than other types of adoptions).

C.F.R. § 80.3(b)(l)(i). Using these criteria to make adoptive placements treats individuals differently on the basis of race or national origin in determining whether they can adequately parent and affords individuals different opportunities to be adoptive parents based on their race in violation of 45 C.F.R. § 80.3(b)(l)(v) and 45 C.F.R. § 80.3(b)(vi). SCDSS' use of "culture" as a proxy for race or national origin to make race-based placement decisions also violates Title VI and Section 1808(c). These decisions deny parents the opportunity to adopt on the basis of the parent's race or national origin, and deny the placement of children on the basis of race or national origin, in violation of Section 1808(c)(l) and Title VI. Moreover, as carried out by SCDSS, adoptive decisions purportedly based on "culture" deny parents the opportunity to be considered as adoptive resources for children on the basis of race or national origin and, therefore, deny parents and children a service or benefit on the basis of race or national origin in violation of 45 C.F.R. § 80.3(b)(l)(i). By treating parents differently from other parents on the basis of race or national origin in determining whether they satisfy conditions necessary to be adoptive parents, SCDSS' use of culture in placement decisions violates 45 C.F.R. § 80.3(b)(l)(v). Finally, by affording parents and children different opportunities to participate in the program depending on their race and national origin, the SCDSS use of "culture" in placement decisions violates 45 C.F.R. § 80.3(b)(vi).

B. Adoption Specialists Use Color Matching to Place Children.

Evidentiary Findings:

South Carolina policy requires that all assessments of prospective adoptive parents include detailed descriptions of their physical characteristics. These requirements include not only the race of the prospective parent, but also the parent's "Complexion."[37] In analyzing prospective parent assessments, OCR found that SCDSS used "complexion" to describe a prospective parent's skin color. For instance, OCR found that parents are not only categorized by race by SCDSS. Black parents are also described as "light-skinned" or "dark-skinned." White parents are further described as "fair" or "medium" or "olive." In making placement decisions for infants, Placement Committees are required to consider the potential parents' "physical characteristics."[38] These policies allow for and encourage Adoption Specialists and Placement Committees to use color matching of prospective parents and children when making placement decisions.

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[37] State Manual 1990, Pg. Ref. No.: 495, Family Assessment. The current SCDSS manual retains the requirement that prospective adoptive parents' "complexion" be recorded. South Carolina Department of Social Services Human Services Policy and Procedure Manual, Section 437, Foster/Adoptive Family Assessment/Pre-Placement Investigation Outline, Subsection III (Revised Effective July 2004). Current SCDSS policies also require recording of the "complexion" of the child to be placed for adoption. South Carolina Department of Social Services Human Services Policy and Procedure Manual, Section 434, Background Summary Outline, Subsection LA (Revised Effective November 2003).

[38] State Manual 1990, Pg. Ref. No.: 486, Selection Criteria.

OCR found that SCDSS used color in making adoption placement decisions by giving preferences in adoptions to parents whom SCDSS considered to be closer in complexion or color to the child in need of placement. In describing their practices, Adoption Specialists and Supervisors acknowledged using color in making adoptive placement decisions. This practice was borne out in case files. For example, in a September 13, 1996 case, Region II had a Placement Committee meeting to place 6 year old black male twins. One family considered was Mr. and Mrs. James R, described in the assessment as a "light brown" "Afro-American" mother and a "dark brown" "Afro-American" father. One of several reasons listed for their denial and the selection of a different family was that the other family was a "better color match."

Analysis:

Based on SCDSS policies which require "color" of parents to be listed prominently in their assessments and which require SCDSS staff to consider "physical characteristics" in placing infants, and based on statements from Adoption Specialists that they have used color matching in placement decisions, the evidence shows that SCDSS does make and/or encourage adoptive placements based on the color of the parent or child. Using parents' color to make adoptive placements treats parents differently because of their color in determining whether the parent can be a parent and affords parents different opportunities to be adoptive parents based on their color in violation of 45 C.F.R. § 80.3(b)(l)(v) and 45 C.F.R. § 80.3(b)(vi). Such practices or policies deny parents the opportunity to become adoptive parents on the basis of their color and the color of the child involved and thus violate Section 1808(c)(l)(A). Such practices or policies also delay or deny the placement of a child for adoption on the basis of the color of the adoptive parent or the child involved in violation of Section 1808(c)(l)(B). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). Furthermore, SCDSS' use of color in making placement decisions favors certain parents over others on the basis of color and thus subjects individuals to discrimination and denies them services or benefits on the basis of color in violation of 45 C.F.R. § 80.3(a) and 45 C.F.R. § 80.3(b)(l)(i).

C. Adoption Specialists Impermissibly Use the Racial Preferences of Young Children.

Evidentiary Findings:

OCR found that SCDSS Adoption Specialists use the racial preferences of young children when making placement decisions. In preparing children for adoption, Adoption Specialists generally interview the child at length about their feelings in regards to adoption. These interviews help Adoption Specialists determine if adoption is suitable for the child or if another plan should be sought. If a child expresses concerns about

adoption, the interview process allows the Adoption Specialist to work with the child to help the child understand what will happen in the process and how the child will be affected. Many times children express fears or concerns that the children can overcome with the help of the Adoption Specialist. For instance, most children will be placed away from their previous neighborhoods and away from friends, and the Adoption Specialist must help the child adapt to that change.

As part of the interview process, Adoption Specialists routinely ask children what sort of family they want to be placed with. If the child states that he or she does not want to be placed transracially, the Adoption Specialists will usually accommodate that request and work to match the race of the child with the adoptive parent. However, if the child expresses another preference, such as a desire to be placed in a family with a large home or to be placed near his friends, the Adoption Specialist may attempt to encourage the child be more flexible or may simply ignore the child's request. OCR found that SCDSS Adoption Specialists treated a child's racial preference differently from his or her other preferences. Towards this end, SCDSS staff will attempt to honor a child's preference for a family of the same race even if the child is younger than the age of consent, which is fourteen in South Carolina. Adoption Specialists stated that they would consider a child's preference for a same-race placement "when they are mature enough" or "if they are adamant" or depending "on their ability and likelihood to disrupt [a placement]" or "whenever the child is capable of expressing such preferences" or "when they can verbalize."

However, SCDSS does not give children's expressed preferences for a transracial placement the same deference as is accorded child preferences for a same-race family. Caseworker notes from a child's file demonstrated that an Adoption Specialist questioned a Black child who said he wanted to be adopted by White parents. The caseworker prodded the child to consider whether he wanted White adoptive parents only because the child's foster parents were White, and asked the child to consider whether a Black family might be acceptable despite the child's initial preference for White parents. Following this discussion, the child acceded to a same-race placement. Staff admitted that they viewed child requests for transracial preferences differently - and more negatively - than requests for same-race placements. An Adoption Specialist said, "Once I had a Black sibling group to place and they wanted to be placed with a White family because only White people had been nice to them. That made me concerned, but I wouldn't have been concerned if the child only wanted a Black [family]."

Moreover, SCDSS staff admitted that delay in placement results from making placement decisions on the basis of children's racial preference. In one region, staff admitted that the placement of two children was delayed due to considerations of race based on the children's preferences. In another region, staff admitted that by honoring a child's racial preference, the staff was not able to consider the only qualified families that were able to

adopt a child. Thus, the child's placement was delayed until a qualified parent of the specified race could be found.

Analysis:

Section 1808(c) forbids denying to any person the opportunity to adopt on the basis of race, color or national origin. Title VI prohibits a recipient from discriminating on the basis of race, color or national origin. Because SCDSS treats a child's preference for a same-race placement differently from the child's other preferences, SCDSS exhibits an intent to place children on the basis of race. This denies parents the opportunity to be considered as an adoptive resource on the basis of race and thus violates Section 1808(c) and Title VI. Section 1808(c) also forbids delaying or denying the placement of a child on the basis of race. Staff acknowledged that their actions did result in delayed placements for children.

SCDSS staff and supervisors defended their practices by arguing that they were simply honoring the child's racial preferences. SCDSS staff and supervisors also argued that these practices are necessary to ensure that children do not disrupt a placement. However, SCDSS practice of honoring a child's preference still requires SCDSS to take race or ethnicity into account. Any use of race, color or national origin by SCDSS to exclude families from consideration must still be supported by a showing that there is a compelling governmental interest. The fact that a child states his or her preference for a family of a particular race does not automatically or in every case establish that a placement consistent with the child's racial preference would be in the child's best interests and thus would meet the legal standard of strict scrutiny. Any decision to consider the use of race, color or national origin as a necessary element of a placement decision must be based on the facts of the particular case and the child welfare agency should not, on the basis of race, color or national origin, dismiss as possible placements families who are able to meet the individualized needs of the child. The routine deference to and wide range of reasons given for SCDSS' following the same-race preferences of young children undermines any claim that these placement decisions are truly individualized.

Among other issues in evaluating a child's individualized needs and expression of racial preference, a child welfare agency may consider whether State law gives the child the right to consent to adoption because the child is of a certain age. In South Carolina, however, the age of consent to adoption is fourteen. Thus, when SCDSS makes placements based on the racial preferences of young children, SCDSS cannot avoid the fact that these placement decisions are state action, not merely a child's decision. Moreover, SCDSS' argument that it is only abiding by children's preferences is contradicted by facts documenting that children's preferences for transracial placements are viewed with skepticism, questioned, and are not routinely followed.

Moreover, evidence indicates that SCDSS treated race differently than other preferences expressed by children. In regards to other child preferences, such as a desire for a large house, Adoption Specialists admitted that they would try to convince a child to be "reasonable." If a child still insisted on an unreasonable preference that disqualified the best adoptive resource, some Adoption Specialists admitted they would allow the child to meet the parent and/or may let the child stay with that parent for a trial period. SCDSS demonstrated no reason why a child's preference for a same-race placement could not be treated similarly. Finally, there is also enough evidence to conclude that the justifications for honoring children's racial preferences are pretext. Many Adoption Specialists admitted that they treat other children's preferences differently than they treat preferences for same-race placements. Moreover, SCDSS does not treat a child's desire for a transracial placement the same way as a child's preference for a same-race placement. If a child has a preference to be adopted transracially, Adoption Specialists assume there is something wrong and try to correct the child's thinking. Such admissions lead OCR to conclude that SCDSS uses children's preferences in same-race placements as a pretext to justify its own preference for same-race placements.

OCR finds that SCDSS' policies and procedures that honor the racial preferences of younger children and that treat race differently from other child preferences constitutes an impermissible use of race. In treating race differently from all other child preferences, SCDSS demonstrates that SCDSS' own choice, and not the choice of children, denies prospective parents the opportunity to become adoptive parents on the basis of the child's race in violation of Section 1808(c)(1)(A). In cases where the only suitable parents to adopt a child are of a different race than the child's preference, SCDSS' decision to routinely treat race differently than other preferences and honor the child's race preference will delay the placement of the child as another family of the child's race is sought in violation of Section 1808(c)(1)(B). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). By treating same-race preferences differently from other child preferences, SCDSS considers different groups of prospective parents for similarly situated White and Black children. SCDSS' differential treatment of prospective parents and children subjects them to discrimination on the basis of race in violation of 45 C.F.R. § 80.3(a) and treats them differently in determining whether they can be provided any service or benefit in violation of 45 C.F.R. § 80.3(b)(1)(v).

5. Individual Violations

In the course of its investigation of SCDSS adoption policies and practices, OCR became aware of cases in which parents' attempts to adopt children were delayed or denied due to their race or national origin, and the race or national origin of the child in question. OCR also learned of cases where children's placements were delayed or denied due to their

race or national origin or the race or national origin of prospective adoptive parents. OCR's findings with respect to these individual violations are described below.

A. George and Theola M and Joseph

OCR's interviews with staff and witnesses and extensive document review establish that SCDSS discriminated against George and Theola M on the basis of their race. George and Theola M are a Black couple who had fostered almost two dozen children through SCDSS and had adopted two young Black girls. The M's had been well treated by SCDSS when fostering children or when adopting their African American girls, but when the M's attempted to adopt a Hispanic child named Joseph, SCDSS' treatment towards them changed. SCDSS put numerous roadblocks in the M's path to deter them from adopting Joseph. In several instances, SCDSS deviated from established policy and procedure in its attempts to deny the M's the opportunity to adopt Joseph. SCDSS did not consider the M's as an adoptive resource for Joseph, despite their interest and record of providing Joseph with good care as foster parents. Instead, SCDSS chose to place Joseph with a Hispanic family. After SCDSS' placement decision was overturned by the SCDSS Fair Hearing Committee, SCDSS delayed processing Mr. and Mrs. M's application to adopt Joseph even though the Fair Hearing Committee's administrative order directed that Mr. and Mr. M be given "first consideration" as Joseph's adoptive parents. As described more fully below, SCDSS' actions discriminated against the M's and Joseph on the basis of race and national origin in violation of Title VI and Section 1808(c).

Evidentiary Findings:

Mr. and Mrs. M are a Black couple who have been married for more than 30 years. Mr. and Mrs. M had three boys who they raised to adulthood. Mr. and Mrs. M also adopted two daughters in 1999. Mr. and Mrs. M have acted as foster parents for approximately 20 other children in SCDSS custody. For six of those children, the M's provided long-term foster care placement.

In late November of 2000, SCDSS placed a newborn boy with Mr. and Mrs. M as a foster child. The boy, named Joseph, had been born just three days earlier and had been abandoned at the hospital by his Hispanic mother. The boy's birth father was also Hispanic and was reported to be a resident of Guatemala. Almost immediately upon taking Joseph into their home, on December 5, 2000, Mr. and Mrs. M informed the SCDSS foster care worker that they wanted to adopt the child. Again, on December 27, 2000, the foster care worker noted that the M's "stressed [their] interest in adopting [Joseph]." At that time, the foster care worker provided the M's with a number for SCDSS Adoptions. The record suggests that the M's called SCDSS Adoptions and were sent an application and directed to fill it out and return it to SCDSS Adoptions.

In early January of 2001, Joseph's case was referred to SCDSS Adoptions with the plan of terminating parental rights and placing the child up for adoption. At the January 18, 2001 staffing, SCDSS Adoptions decided to use the state computer matching system to find approved families who would be interested in adopting Joseph. The staffing sheet from that date reads: "[make] computer run for child to check approved families." A note was made that "[the M's] may apply for child," but there was no other indication that SCDSS would pursue or consider the M's as an adoptive resource.

In late December 2000, and early January 2001, Joseph became persistently ill and Mr. and Mrs. M rushed Joseph to the emergency room and took him to several follow-up appointments. After numerous tests, Joseph was diagnosed and hospitalized for three days with Salmonella, which doctors thought he contracted through his birth mother. The M family, especially Mrs. M, exhibited a strong attachment to Joseph by maintaining a family presence by Joseph's hospital bed until he was well. Mrs. M said in her statement that she "would not leave his side" while Joseph was at the hospital. She said she and her family "were sick with worry over Joseph, as we loved him as much as any parents can love their son."

On January 26, 2001, the Adoption Specialist working on Joseph's case submitted a Request for Prospective Adoptive Parents to the state database that sought parents who had indicated an interest in adopting an infant of "Other" race. A Prospective Adoptive Parents form from January 30, 2001, lists 29 prospective families. None of the names on the list are historically Hispanic surnames. On February 6, 2001, the Adoption Specialist for Joseph recorded that he "read through state records for appropriate families." On that same date, the Adoption Specialist also indicated that he would contact the other adoption regions in an attempt to "discover any other possible resources." The notice that the Adoption Specialist sent to the other regions included a picture of Joseph and described him and his medical and legal history. The notice also specified that, "We are seeking appropriate adoptive applicants who closely match the following: *Hispanic/Latin background* or willingness to allow [Joseph] to pursue his cultural heritage...." (Emphasis added.)

On February 20, 2001, the M family turned in their application to adopt Joseph. On March 6, 2001, the SCDSS Adoption Specialist visited the M home to discuss Joseph's case and the placement of Joseph in an adoptive home. In his notes from that meeting, the Adoption Specialist noted that the M's reiterated their desire to adopt Joseph. The Adoption Specialist told the M's that they were not approved applicants and only approved applicants could be considered as an adoptive resource. The M's told the Adoption Specialist that they had sent in their application several weeks before and they would send in the remaining paperwork that day. The Adoption Specialist assured them that he would indicate their desire to adopt Joseph to the placement committee. However,

Mr. M indicated in his statement that the Adoption Specialist seemed to indicate that Joseph would be placed elsewhere.

In his records from that meeting, the Adoption Specialist noted that "[I] later learned that [Mrs. M] underwent heart surgery within the last year." The Adoption Specialist also theorized that Mrs. M had become depressed after the surgery and the depression had ceased once Joseph had been placed in their home. But the Adoption Specialist never cited a source for this medical information about Mrs. M. However, both Mr. and Mrs. M noted in their statements that Mrs. M had bypass surgery in April of 1998 and that the surgery had not been an issue when they adopted their two daughters, who are African American, in March of 1999.

In the records of a foster care meeting from April 13, 2001, the foster care worker noted that "Mr. and Mrs. M and their family [have] become very attached to [Joseph] and hope to adopt him." The foster care worker also noted the strong bond between the baby and the M family and noted, "[Joseph] appear[s] to be a happy baby as long as he is with [Mrs. M] or in her [presence]." About the adoption application, the foster care worker noted that "they have completed all of the paperwork but will need an adoption study done."

In their statements, both Mr. and Mrs. M indicated that at this time they believed their application for Joseph was complete; they had given notice to SCDSS on March 6, 2001, that they believed as of that day that their application would be complete. There is no record of any attempt by SCDSS to contact the M's about anything missing from their application prior to the placement committee process. However, on March 20, 2001, the Adoption Specialist communicated to a colleague that they had identified four approved applicants who would be considered at placement committee. He noted, "As Mr. and Mrs. [M] do not have an approved application on file, we will not be able to consider them." In the same communication three days prior to placement committee, he also asked for special permission to provide the M's with less notice than usual before removing their foster child:

> I would like to tentatively present and place [Joseph] on Thursday, March 29, 2001. I know we must present a 10-day notice to the family, but please ask them if they would consider waiving it to 9 days.

On March 23, 2001, a placement committee meeting was held to select an appropriate family for the infant, Joseph. The family chosen had a historically Hispanic surname. Another family that had been considered but not chosen also had a historically Hispanic surname. The record does not indicate the names of the other two families who were considered and whether they were of Hispanic origin. The record contains a form that was used to gather information about prospective adoptive parents that would be presented to

the placement committee. On that form, the Adoption Specialist made a special note about the father in the family that was chosen to adopt Joseph. The note read that the father was "born and raised in Mexico."

On March 26, 2001, the Adoption Specialist sent an email to SCDSS legal counsel. He said that his supervisor suggested that he contact counsel about "the removal of an infant from a foster home and placement of him in an approved pre-adoptive home." He said that the foster family are not approved applicants, but they "have submitted a few pieces of the paperwork." He also claimed that "the foster mother recently underwent major heart surgery and apparent depression." He claimed that SCDSS selected a "more appropriate family for this child." He asked how best to proceed with the case legally and whether or not the family had any appeal rights. He indicated that he thought the foster family could only appeal removal after six months: "Also, can the family appeal the removal four or six months after placement? My initial understanding was six months, however, I may be in error."

On March 27, 2001, the day after he represented to SCDSS counsel that the M's had only submitted "a few pieces of paperwork," the Adoption Specialist sent a note to a colleague asking what documents the M's had actually submitted in regards to their application for Joseph. In her reply, the colleague said that she had spoken to their Supervisor who wanted a "complete checklist of what has been submitted for [the M's] application." The colleague indicated that the Supervisor wanted the information in anticipation of a meeting that would follow the next day between Mr. and Mrs. M, the Adoption Specialist and the Supervisor.

Only days later, the Adoption Specialist and the SCDSS Supervisor went to the M household to notify them of the placement committee decision. In his notes, the Adoption Specialist noted that the Supervisor told the M's that "a more appropriate family had been selected" but that the M's did have a right to appeal the decision as the child had been in their foster care for more than 120 days. The supervisor and Adoption Specialist told them that with adoption, the health of the parents is an issue. He noted that the "Supervisor tried to refocus the conversation to talk about the long range best interests of the child. The foster parents attempted to indicate that it was a racial issue." He reported that Mr. and Mrs. M became "somewhat enraged" and dismissed him and the Supervisor from the home and asked them not to return. There is no record that at this meeting Mr. or Mrs. M were told that there had been a problem with their application.

In their statements recalling this meeting, both Mr. and Mrs. M stated that they felt that the SCDSS Supervisor was discouraging them from trying to pursue the adoption of Joseph. Mrs. M said that the Supervisor called her "selfish" for wanting to adopt Joseph. She said that the Supervisor told her that other families were interested in adopting Joseph and that he would be "better off with another family." Mrs. M also said that the

Supervisor told her that Mrs. M was too sick to adopt Joseph and might not live to see him grow up. Mrs. M said that she told the Supervisor that:

> I did not deserve to be treated like that and that I knew when they looked at me all they saw was a Black woman with a Hispanic child, but that was just because they couldn't see the love I had for that child or he had for me, and that was all that really mattered.

Mrs. M also stated that:

> The way she spoke to me made me sad and depressed. I cried for a long time after that meeting. I felt like she talked to me like I was nobody, and that her statements gave no regard to the fact that I am a good mother who successfully adopted and raised two children and who cared for many other foster children. I felt that race was behind their statements and accusations. For instance, when they said that I was being selfish because other families wanted to adopt Joseph and he'd be better off with another family, I felt that what they meant was that he would be better off with a family that wasn't Black.

On April 3, 2001, a few days after the meeting between the M's and SCDSS staff, the Supervisor wrote to the SCDSS attorney about the case. She said that although SCDSS was aware that Mr. and Mrs. M had expressed interest in adopting Joseph, they selected another family "based on several considerations." She claimed that the M application was not complete. She claimed that the M's had not submitted all required documentation including "autobiographical statements, updated medical forms, military discharge papers, amended birth certificates on their two adopted children, letters of reference and current fire and health inspection reports and FBI fingerprint results."

However, the March 28, 2001 checklist of information required to complete an assessment that had been done at the request of the Supervisor indicated that SCDSS had "not yet requested" the health and fire inspection reports. The correspondence to the Adoption Specialist also specified that "fingerprint cards have not been sent to them. (We received cleared FBI checks)." SCDSS policy also seems to contradict the SCDSS Supervisor as to the necessity of the other material. Although a first-time applicant to adopt a child must provide a great deal of information,[39] the M's were reapplying for adoption, as they had previously been approved to adopt two girls. In a reapplication case, the State Manual says the Adoption Specialist is only required to request their prior adoption record from the state office, schedule one home visit, and complete a family

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[39] See State Manual 1990, Chapter 4, Section 454.04, Family Assessment, pages 75-79.

assessment summary.[40] Other information may be requested "as appropriate," but the language is permissive and not mandatory.

The April 3, 2001 memo from the Supervisor to the attorney also claimed that Mrs. M has "recently undergone quadruple bypass surgery and has indicated that she experienced severe postoperative depression that was alleviated only by the placement of this child in her home." As previously noted, Mrs. M's bypass surgery took place in 1998, according to Mr. and Mrs. M, and was not an issue in the adoption of their two black daughters. The April 3 memo also claims that, when informed that Joseph would be placed with another family, "Mrs. [M] reacted with extreme anger and hostility that rapidly escalated to the point that [we] were concerned about the safety and well-being of the child. [We] reported this concern to staff at Saluda county DSS, and were assured that Saluda County DSS would make contact with the [M's]."

Except for the April 3, 2001 memo from the SCDSS Supervisor to legal counsel, the record contains no other indication that there were any problems with Joseph's placement or that the M's were not providing him with excellent care. SCDSS Adoptions and Foster Care staff all made positive comments about Joseph's well-being in notes from house visits on March 6, 2001, March 13, 2001, October 23, 2001, December 19, 2001, May 30, 2002 and June 27, 2002. These include comments such as, "[Joseph is a] cheerful baby" and "[Joseph] continues to get along well" and "[Joseph] is very bonded to fcp [foster care parents]".

On April 4, the M's filed a written notice that they would appeal the SCDSS decision to remove Joseph from their home. Also on April 4, the foster care worker visited the M household. The report from that visit does not indicate any concern about the child's well-being. The report does note that the M's "made reference to a home visit by Adoptions and they stated that some things were said by the Adoption staff that [were] not called for."

On May 9, 2001, an email was sent, apparently by the adoption specialist, suggesting that SCDSS still had not provided the M's with notice that anything was missing with their application. The email said, "I have continued to wait for instruction as to whether I am to send the remaining paperwork for them to complete their application. It is my understanding that we were waiting for legal advice as to whether to proceed." The apparent response to this email, sent the same day, said, "I never got any clear advice from [legal counsel]. Since it has been this long, let's wait until after the appeal hearing. [A Supervisor's] only definitive statement was, 'Do we want to give them any encouragement at this state?"

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[40] State Manual 1990, Section 454.07, Reapplication for Adoption, Page 83-4.

An SCDSS administrative fair hearing to appeal the decision to remove Joseph from the M home was held on June 4, 2001. The issue in the hearing was whether SCDSS followed proper procedure in removing Joseph from the M home. The M's represented themselves without benefit of an attorney. The Findings of Fact from the hearing noted, "The DSS supervisor testified that the application for adoption submitted by the Petitioners was not complete, due to incomplete addresses for the references and the [M's] failure to sign the financial statement. The DSS Supervisor did not identify any other missing information." According to the Findings of Fact, the DSS Supervisor also testified that the M's adoption records were requested from the state office and reviewed on March 28, 2001—five days after the placement committee met on March 23, 2001 to decide the adoptive placement. The Findings of Fact noted that, "The Supervisor testified that the Petitioners were considered as an adoptive placement." The Supervisor also testified that she went to the M household to speak to the Petitioners about the situation and "to help them with the separation."

At the hearing, Mrs. M testified that if they had delayed in completing the adoption application, it was because Joseph had been very sick and that "his needs came first." She also testified that she felt "the only reason the DSS Supervisor came to her home was to tell her to let the child go and not file an appeal."

On July 30, 2001, the SCDSS Fair Hearing Committee issued a Final Administrative Order regarding the M's appeal. The Fair Hearing Committee found that SCDSS had not complied with notice requirements and therefore did not afford the M's due process. The Fair Hearing Committee also noted that under the Family Preservation Manual, Chapter 9, § 928, an Adoption Worker had an obligation to consider the adoption application of a foster parent who wanted to adopt a child who had resided in the foster home at least six months, when the child has a "meaningful relationship of significant duration" with the foster family. Accordingly, because Joseph had been with the M's over six months at this point in time, the Fair Hearing Committee stated that Mr. and Mr. M "must be given first consideration as adoptive parents."

However, SCDSS appears not to have consulted and coordinated with the M's in processing their application. In October of 2001, more than two months after the Fair Hearing Committee issued its order, the Supervisor on the Joseph case responded to a question from her superior by admitting that they still hadn't approved or denied a home study. She claimed that the legal counsel had recommended that they suspend any further action on the application pending the outcome of the appeal hearing. She provided no excuse, however, for the inaction by SCDSS since the hearing decision. She also admitted that "I think it would be difficult for us to be objective in conducting an adoptive home study on the family at this point.... If it is the decision to proceed with their application, we may need to consider referring to another Adoption office." In response, her superior wrote, "So their application is still hanging?" The superior suggested that a certain

Certified Investigator do a home study assessment and that the result should be sent to her for approval, rather than the regular Supervisor. The Supervisor responded that she thought that the Certified Investigator could do a "good thorough assessment." She also noted that, "We have never before assigned the [M's] to a CI [certified investigator], so it shouldn't appear as though we are 'shopping around' for a CI to support our position." The Supervisor then thanked her superior for her help and noted that, "This case has been bothering me...."

On November 8, 2001, the Supervisor sent a letter to the Certified Investigator, asking her to do a Home Study Assessment of the M's. She said in the letter, "I hope that you will accept this study as I will need a good, thorough assessment which addresses the special issue of transracial adoption. Mrs. [M] has had some health issues in the past, although the enclosed medical now indicates that she is in good health." On March 12, 2002, the Certified Investigator finished her home study assessment. The assessment provided an unqualified endorsement of the M's and recommended them, "without reservation," as adoptive parents for Joseph. An excerpt from the assessment reads as follows:

> [Mr. and Mrs. M] are a calm, patient, and caring couple, as well as experienced parents, who have proven their capacity to nurture, protect, and accept children not born to them. They have raised three biological sons, who are reportedly responsible individuals and productive adults, and have made long-term commitments to several of their foster children over the years. They also have adopted two of their former foster daughters, who appear to be happy, healthy, and well-adjusted children. [Mr. and Mrs. M] are open and honest about adoption and seem to genuinely appreciate their experiences as foster and adoptive parents. [They] are committed to making the parenting of [Joseph] a priority in their lives. They are also committed to providing [Joseph] with a safe and secure home environment that incorporates their educational, religious, social, and family values.

On October 12, 2001, the termination of parental rights was completed on Joseph. SCDSS records note that he became legally free for adoption in December of 2001. Mr. and Mrs. M stated that it still took a long time for the adoption to be finalized. They said the adoption was not finalized until around June of 2002. A note from May 29, 2002, said that the Adoption Specialist "will discuss with foster parents the importance of their learning of [Joseph's] birth culture as a means to meet his emotional needs." Mrs. M also stated that around the time the adoption was finalized, the Supervisor from SCDSS called her on the phone and apologized. The Supervisor "admitted she should not have done what she did."

As part of its interviews in the region, OCR interviewed an Adoption Specialist who had been consulted on this case. When OCR asked if she knew of any cases where a placement was delayed due to considerations of race and/or ethnicity, she said that the M case was possibly such a case. She said that SCDSS Adoptions did not want to place Joseph with the M's because there was "concern that the family would not meet the child's cultural needs."

Analysis:

OCR finds that SCDSS Adoptions denied and delayed the M's application to adopt Joseph on the basis of race and national origin. OCR further finds that all justifications put forth by SCDSS to defend its actions are a pretext for discrimination on the basis of race and national origin. As SCDSS delayed and denied the M's application on the basis of race and national origin, SCDSS violated the M's individual rights under Title VI and Section 1808(c). The basis of OCR's findings is summarized below.

First, it is apparent that SCDSS knew of the race and national origin of the child, Joseph, and the M family. SCDSS records indicate that SCDSS knew of Joseph's ethnic background since the date his case was transferred to SCDSS adoptions on January 5, 2001. SCDSS also knew of the M's race as SCDSS had a long history placing foster and adoptive children in their care. SCDSS staff had made numerous face-to-face visits with the M's and SCDSS' records indicate that it knew that the M's were African American.

The record firmly establishes that the M's have been an excellent foster and adoptive resource for SCDSS for the past 21 years. SCDSS placed approximately 20 foster children with the M's, some for extended periods, and all did well. SCDSS placed two young girls adoptively with the M's and they are doing exceptionally well. In its own assessments of the M's ability to be adoptive parents, SCDSS conducted home study assessments in 1998 and 2002 that were both extremely favorable. The record also indicates that the M's were an excellent placement for the child Joseph. As early as March 6 and April 13, 2001, SCDSS Adoptions and foster care home-visit reports commented on the child's "well-being" and the strong bond formed between Joseph and the M's. Subsequent reports confirmed the strong attachment that had been formed between the child and the M's.

The record also indicates that SCDSS Adoptions departed from standard procedure in not considering the M's as an adoptive resource. In OCR's interviews with SCDSS Adoptions, many Adoption Specialists indicated that SCDSS gives a strong preference to foster parent adoptions because placing a child with his foster parents provides continuity and stability. Furthermore, SCDSS Policy specifically directs Adoption Specialists to consider the foster parents as a potential adoptive resource. The State Adoption Manual reads as follows:

> The Department's goal of permanency planning for children in foster care requires a casework plan for continuity and stability. If return to the family on a timely basis is not the plan for the child, foster parent adoption *must* be considered.[41]

Although the M's had stated as early as December 5, 2000, that they would like to adopt Joseph, SCDSS Adoptions never considered the M's as an adoptive resource. The staffing sheet from January 18, 2001, indicates that SCDSS knew of the M's interest but did not plan to take any action to pursue or consider the M's as an adoptive resource. The record also shows that SCDSS did not encourage or assist the M's to apply. For instance, SCDSS did not inform the M's what materials were missing from their application prior to placement committee.

At various times, SCDSS maintained that it could not consider the M's as an adoptive resource because their application was not complete. However, SCDSS was requiring application materials from the M's that SCDSS' State Manual does not require in the reapplication context. Thus, the SCDSS claims that they could not consider the M's as an adoptive resource for Joseph were not supported.

At other times, SCDSS maintained that it had considered the M's as an adoptive resource. At the removal hearing, the SCDSS Supervisor testified that SCDSS had considered the M's as an adoptive placement; however, the record contradicts her statement. The supervisor herself admitted at the hearing that she never reviewed the M's adoptive record. She also admitted that the Adoption Specialist in the case did not review the M's adoption record until March 28, 2001—five days after the placement committee had placed the child with a different family. Also, in an email to a colleague, the Adoption Specialist had requested special permission to remove Joseph from the M home three days prior to placement committee. In other words, SCDSS planned to send a removal notice to the M's *before* the placement committee met and only looked at the M record *after* the placement committee met. Thus, the evidence does not support any claim that SCDSS considered the M's as an adoptive resource. Moreover, SCDSS disregarded their own policy in not considering the M foster family as a resource for Joseph. This departure from standard procedure is evidence of discriminatory intent.[42]

The evidence suggests that SCDSS did not consider the M family as an adoptive resource for Joseph because SCDSS was specifically seeking a Hispanic family to adopt Joseph. In looking for prospective families for Joseph, SCDSS first used its computer-matching program, seeking families that were interested in adopting a child of "Other" race. When

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[41] State Manual 1990, Chapter 4, Page Reference Number 488, Page 206. (Emphasis added).
[42] See Arlington Heights v. Metropolitan Hous. Redevelopment Corp., 429 U.S. 252 at 267 (1977).

none of the 29 names in the resulting Prospective Adoptive Parents list was Hispanic, the SCDSS Adoption Specialist then sent a recruitment sheet to the other regions specifically seeking a parent with a "Hispanic/Latin background." Of the four families that were considered at the placement committee for Joseph, at least two of the families had Hispanic surnames. In addition, the Adoption Specialist made a special note of pointing out to the placement committee that the father of the family selected to adopt Joseph was "born and raised in Mexico."

The finding of discriminatory intent is also strongly supported by the admission of the Adoption Specialist who consulted on the case that there was "concern that the family would not meet the child's cultural needs." Discriminatory intent is also suggested by the May 29, 2002 note from the second Adoption Specialist working on the Joseph case. The note said that she would "discuss with foster parents the importance of their learning of [Joseph's] birth culture as a means to meet his emotional needs."

The finding that SCDSS discriminated on the basis of race and national origin in attempting to find a Hispanic family to adopt Joseph is also supported by the fact that SCDSS discouraged and delayed the M application to adopt Joseph. Both Mr. and Mrs. M allege that, after SCDSS chose a Hispanic family for Joseph, SCDSS attempted to discourage the M's from appealing this decision. Mr. and Mrs. M. allege that race motivated SCDSS' actions. Their statements have been consistent and are supported by the record. The notes from the SCDSS Adoption Specialist himself indicate that SCDSS sought to dissuade the M's from appealing on the basis of "the long-range best interests of the child."

OCR's finding of discriminatory intent in this case is also supported by the findings of discrimination within SCDSS Adoptions as a whole. As described in OCR's findings of systemic discrimination, SCDSS Adoptions have a pattern and practice of making race-based and national origin-based decisions. For instance, various staff said that they would use race, color and national origin in making placement decisions. Other staff said that they consider culture in making placement decisions and that race and ethnicity are a part of culture. The staff also treats race and national origin differently in identifying adoptive resources based on the preference of potential adoptive parents. SCDSS also makes placement decisions based on the racial and ethnic preferences of biological parents and the racial preferences of young children.

SCDSS' decision to place Joseph with a Hispanic family, rather than with the M's, denied Mr. and Mrs. M the opportunity to adopt Joseph and denied Joseph's adoptive placement on the basis of race and national origin. In addition, SCDSS delayed Joseph's placement after the SCDSS Fair Hearing Committee overturned Joseph's placement with the Hispanic family because the M's had been denied adequate due process, and ordered that SCDSS give the M's "first consideration" as adoptive parents for Joseph. After the M's

appealed the removal of Joseph, an SCDSS supervisor told staff not to proceed with the M's application. The reason she provided for delaying work on the application showed the SCDSS discriminatory intent against the M's: "Do we want to give them any encouragement at this state?" Finally, more than two months after the hearing which found that SCDSS had denied the M's due process in attempting to remove Joseph from their home, SCDSS still had not moved forward on the M's application. The SCDSS Supervisor admitted that it would be difficult for her office to be objective in conducting a home study of the M's.

OCR finds that the reasons proffered by SCDSS to explain their actions are simply pretext to explain discriminatory conduct. At various times, SCDSS claimed that it did not want to place the child with the M's because of Mrs. M's health. However, the SCDSS arguments about Mrs. M's health were not based on the record. The SCDSS Adoption Specialist and Supervisor both asserted that Mrs. M had had a "recent" bypass operation "within the last year." However, Mr. and Mrs. M claim that Mrs. M had surgery in 1998, prior to their adoption of two black girls from SCDSS, and that Mrs. M's health had not been an issue at that time. Nothing in the files reviewed by OCR support SCDSS' contention regarding Mrs. M's health. The fact that SCDSS based its decision without foundation in the medical records of Mrs. M shows that the health reasons were simply pretext.

The record clearly shows that the M's attempts to adopt Joseph were denied and delayed. The evidence also shows that SCDSS departed from standard procedure in not considering excellent foster parents as a resource for a child they were fostering and wanted to adopt. Statements and admissions by decision-makers and SCDSS staff indicate an intent to discriminate against the M's and Joseph on the basis of race and national origin. Evidence also shows that SCDSS relied on fabricated pretexts to explain the denial and delay of the adoption of Joseph by the M's. Moreover, SCDSS' activities are consistent with the same-race policies and practices throughout the regions. All of this evidence, combined with the current findings of discriminatory conduct by SCDSS Adoptions, leads OCR to find that the denial and delay of the M's adoption of Joseph occurred because of the M's race and Joseph's national origin.

OCR finds that SCDSS' conduct concerning the M's attempts to adopt Joseph and in the placement of Joseph violated Title VI and its implementing regulations and Section 1808(c). SCDSS denied to the M's the opportunity to adopt Joseph on the basis of their race in violation of Section 1808(c)(l)(A). SCDSS denied and delayed the adoptive placement of Joseph with the M's on the basis of race and national origin in violation of 1808(c)(l)(B). A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). SCDSS subjected the M's to different treatment and standards based on their race and the national origin of Joseph. The different treatment was not based on an individualized assessment of Joseph's needs and the ability of the M's to meet those

needs, but on generalized assumptions and stereotypes based on race and national origin. SCDSS denied the M's the opportunity to adopt Joseph even though the M's were Joseph's foster care placement, even though the M's and Joseph had formed a strong parent-child bond, and even though SCDSS generally afforded a preference to foster parents who wished to adopt their foster children. SCDSS' conduct violated Title VI and its implementing regulations.

SCDSS' actions subjected the M's and Joseph to discrimination on the basis of race and national origin in violation of 45 C.F.R. § 80.3(a). SCDSS violated 45 C.F.R. § 80.3(b)(1)(ii) by providing services to the M's and Joseph in a different manner on the basis of race and national origin. SCDSS violated 45 C.F.R. § 80.3(b)(iv) by restricting the M's, on the basis of race, in the enjoyment of the preference to consider foster parents for adoption that it afforded to other foster parents. SCDSS violated 45 C.F.R. § 80.3(b)(1)(v) by treating the M's differently from others on the basis of race in determining whether they satisfied conditions necessary to participate in the program. SCDSS violated 45 C.F.R. § 80.3(b)(1)(vi) by affording the M's and Joseph an opportunity to participate in its program that was different than that afforded to others on the basis of race and national origin.

B. Barbara and Thomas V, Sharon and Michael T, Stanley and Kristal B, and Virginia and Duane R and Andre

Evidentiary Findings:

Andre is a mixed race child who was born on April 14, 2002. His birth mother is Caucasian and Vietnamese, and his birth father is African American and Hispanic. His birth parents requested birth parent services prior to his birth. They signed voluntary relinquishments on March 19, 2002.

The birth mother filled out an intake form on January 17, 2002. At that time she was seven months pregnant. Possibly on the same date, she filled out an "Openness Checklist for Birth Parents." There is no date on this form. The Openness Checklist for Birth Parents allows the birth parents to specify how much contact and information they want with the adoptive parents and their child after the adoption. The form also allows the birth parent to make "special requests . . . concerning the adoptive family who is chosen for your child." The birth mother specified that she wanted an adoptive family that was "biracial—of either race—2 parent. Wants to have baby placed with a family that has other children. If there are no other children, at first, it's okay. Someone involved in sports, travel, extracurricular activities."

Prior to the child's birth, the Adoption Specialist assigned to the case looked through the state database to identify prospective adoptive parents. She submitted a Request for

Adoptive Parents Form on February 8, 2002 that identified the child as "Black/White" and "Other." The form did not indicate that the child had any physical or mental problems. The SCDSS database returned a list of 100 prospective adoptive parents. The Adoption Specialist then set about trying to narrow down this list to a number manageable enough to take to placement committee.

The Adoption Specialist requested information from the regional family workers about prospective adoptive parents that they would recommend for an infant. On one sheet, she wrote down brief statements about prospective families based on information provided by the family workers in three regions. On that sheet were the names of nine families. One family was Michael and Sharon T, about whom she wrote, "good family." Another family was Thomas and Barbara V, about whom she wrote, "Surfside—extended and comm. multi-cultural from NY and NJ—accepting ...." About a fourth family, Will and Yvonne H, she simply wrote, "adopted bi-racial infant boy, now 3."

Several other sheets of paper are titled "Family Profile Form" and list basic information about families that were considered. Under the Kristal and Stanley B family, their age and location are listed, along with their education and employment and interests, which include music and sports. Their race is listed as Caucasian. The Michael and Sharon T profile only lists their location, age, approval date and race, which is Caucasian. The Barbara and Thomas V profile only lists their location and race, which is Caucasian. On information from a different file, OCR learned that the Virginia and Duane R family is Caucasian. The Yvonne and Will H profile on the "Family Profile Form" only lists their location, but beside their name is a star and the number "1."

The Adoption file for Andre contains a Family History Information sheet about Will and Yvonne H. These sheets include information about the prospective adoptive parents as well as their immediate family. Information documented includes education, occupation, hair color, eyes, complexion and "nationality—origin". Will H's complexion is listed as "fair". His national origin is listed as "Scotch/English." Yvonne H's complexion is listed as "olive/American Indian" and her national origin is listed as "American."

In the SCDSS case file for Andre, OCR found a document which appears to record the Adoption Specialist's evaluations of the different families prior to the placement committee meeting. Next to Michael and Sharon T's name, the Adoption Specialist wrote, "good" and "5th". Next to Will and Yvonne H's name, the Adoption Specialist wrote, "excellent" and "1st" and "biracial."

The Staffing Sheet from April 9, 2002, records information from the placement committee meeting that was held that day. That sheet records that the birth parents preferred a two-parent family who were involved in sports and the community. It also says that they "desired multiracial family." It records that six families were presented to

the placement committee and Yvonne and Will H were chosen first and Barbara and Thomas V were picked second. On April 16, 2002, SCDSS presented the infant, Andre, to Will and Yvonne H and recorded information from that meeting. The records explain SCDSS' reasoning behind the selection of Yvonne and Will H. It states that Andre's birth parents "requested the adoptive family selected be a two-parent, multi-cultural family, with other children, and who were involved with sports and the community." The note says that Will and Yvonne H were chosen because "the family met the birth parent's desires."

As a part of its investigation, OCR obtained information which documented the reasons Will and Yvonne H were chosen before these other families. For Sharon and Michael T, documentation indicates the reason was, "birth parents desired multi-racial family." Similarly, for Stanley and Kristal B, the reason they were not chosen was, "birth parents desired multi-racial family with other children." Virginia and Duane R were not chosen because, "appropriate family selected based on birth parent desires." And finally, for the Thomas and Barbara V family, the documentation simply says that they were "selected as back-up."

When OCR interviewed the Adoption Specialist who worked on this case, she claimed that the primary factor that SCDSS considered when placing the child was the child's medical needs and not the parents' race. However, she did admit that they tried to honor the birth parents' requests in the adoptive parents, one of which was that the family be multi-racial.

In interviewing a Supervisor from the region that placed the child, Andre, OCR asked for recent transracial placements with information on the race of the child and the adoptive parents. The Supervisor responded by naming the child Andre and claimed that he was placed with Yvonne H, who the Supervisor said was Native American.

Analysis:

OCR finds that SCDSS Adoptions denied the other families in this case the opportunity to adopt the child, Andre, because of race, color or national origin. SCDSS chose the H's to adopt Andre because they believed Mrs. H was American Indian, a conclusion based on Mrs. H's complexion and appearance. The fact that the H's adoptive son was biracial was considered in the selection of the H's as well. The H's were chosen over the other families because the other families were not multi-racial.

The record shows that SCDSS solicited the birth mother's preference in a family. The birth mother expressed a preference for a "bi-racial" family. SCDSS identified the races of all the parents it was seriously considering. SCDSS identified Yvonne H's race as Native American, her "nationality-origin" as "American" and her adopted son as biracial.

SCDSS identified the other families that were considered as Caucasian. SCDSS chose Will and Yvonne H because they "met the birth parent's desires." SCDSS admitted in its case notes that the other families were not chosen because they were not "multi-racial." Thus, the other families were denied the opportunity to become adoptive parents on the basis of race or national origin in violation of Section 1808(c) and Title VI.

That the birth mother may have requested the state agency to find a bi-racial household for her daughter is not a sufficient justification for this practice. SCDSS alone is responsible for making placement decisions, and is required by law to do so without consideration of race, color, or national origin, unless it can demonstrate based on individualized assessments that the consideration of race, color or national origin is in the best interests of the child. SCDSS cannot excuse its use of race in eliminating families from consideration by claiming that it was simply following the wishes of the birth mother.

OCR finds that SCDSS' actions in the placement of Andre violated Title VI and its implementing regulations and Section 1808(c). SCDSS favored Yvonne H's family over the other families because of race, color or national origin. SCDSS denied those other families the opportunity to adopt Andre because of their race, color or national origin. This denial violated Section 1808(c)(1)(A) with respect to Barbara and Thomas V, Sharon and Michael T, Stanley and Kristal B and Virginia and Duane R. A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). By favoring Yvonne H's family over the other families because of race, color or national origin, SCDSS subjected the other families to discrimination on the basis of race, color or national origin in violation of 45 C.F.R. § 80.3(a). SCDSS violated 45 C.F.R. § 80.3(b)(1)(ii) by providing services to the other families in a different manner on the basis of race, color or national origin. SCDSS violated 45 C.F.R. § 80.3(b)(1)(v) by treating the other families differently from Yvonne H's family on the basis of race, color or national origin in determining whether they satisfied conditions necessary to participate in the program. SCDSS violated 45 C.F.R. § 80.3(b)(1)(vi) by affording the other families an opportunity to participate in its program that was different than that afforded to Yvonne H's family on the basis of race, color or national origin.

C. Terry and Karri H and Michael and Catherine G and Melana D

Evidentiary Findings:

Melana D, an African American girl, was placed by SCDSS' Region VI office as an infant. Her staffing took place on April 18, 2002. On April 3, 2002, the Adoption Specialist working on the case received a list of Prospective Adoptive Parents in response to a request sent to the state office. The list of prospective adoptive parents included the names of 37 prospective families. Because a placement committee cannot give serious

consideration to such a large amount of families, the practice for Adoption Specialists is to narrow down the list by examining the parent files or by soliciting the opinions of the regional Family Workers. The Adoption Specialist for this case crossed names off the list of Prospective Adoptive Parents. In her notes on that sheet of paper, the worker explained why certain families were crossed off from consideration. For instance, next to one family that had been crossed off the list, the worker wrote, "Under supervision." Next to another family, the worker wrote, "closed." Presumably, that file had been closed. Next to another family, the worker wrote, "poor, under-educated." Next to Terry and Karri H, however, the worker simply wrote, "White." And next to Michael and Catherine G, the worker wrote, "White with 4 kids of own."

The staffing notes describing Melana's placement committee meeting state that the "BM [Birth Mother] requested 2 parent family with one child and religious and high school educational background. 4 families considered: S (IV), M (IV), P (V), and B (II). M's selected due to stay-at-home mom and one other DSS adopted child in home." The numbers next to the families' names apparently represent the SCDSS adoption region in which those families are located. OCR's research into the other four families revealed that all four of them were Black.

In a May 5, 2002, internal document describing the placement, SCDSS wrote:

> Melana's case was staffed for placement committee. The M family from Marion Co was selected for her. (The B's from Reg II were selected as back-up). The decision was unanimous due to: (1) the baby's reflux and Mrs. M does not work outside the home; (2) the physical match (3) there is an older son who was adopted (4) this family's application was the oldest. This family also met all of the preferences of the birth mother. Worker will notify family's worker in Region IV and tentatively plan placement for next Friday or the 29th.

In another internal document, dated May 3, 2002, the worker wrote that the M's were an appropriate match for Melana because "her birth mother expressed a preference that Melana be adopted by a 2-parent, Black family, with other children and who live away from the Tri-County area."

Analysis:

The documents show that the Michael and Katherine G and the Terry and Karri H family were not considered as adoptive resources for Melana D because of race. In the case of Terry and Karri H, the sole reason they were crossed off the list of prospective adoptive parents was their race. Race was also a factor in the elimination of Michael and Katherine

G. By eliminating Michael and Katherine G and Terry and Karri H from consideration based on their race, SCDSS violated Section 1808(c).

OCR finds that SCDSS' actions in the placement of Melana D violated Title VI and its implementing regulations and Section 1808(c). SCDSS denied Terry and Karri H and Michael and Catherine G the opportunity to adopt Andre because of their race. This denial violated Section 1808(c)(1)(A) with respect to Terry and Karri H and Michael and Catherine G. A violation of Section 1808(c) constitutes a violation of Title VI. 42 U.S.C. § 1996b(2). By denying the H's and the G's the opportunity to adopt Melana because of their race, SCDSS subjected the H's and the G's to discrimination on the basis of race in violation of 45 C.F.R. § 80.3(a). SCDSS violated 45 C.F.R. § 80.3(b)(1)(ii) by providing services to the H's and G's in a different manner on the basis of race. SCDSS violated 45 C.F.R. § 80.3(b)(1)(v) by treating the H's and G's differently from other prospective families on the basis of race in determining whether they satisfied conditions necessary to participate in the program. SCDSS violated 45 C.F.R. § 80.3(b)(1)(vi) by affording the H's and G's an opportunity to participate in its program that was different than that afforded to the other prospective families on the basis of race.

FINDINGS AND RECOMMENDATIONS:

In summary, OCR's investigation establishes that SCDSS, on the basis of race, color, or national origin, denies prospective parents the opportunity to adopt and delays or denies the placement of children. SCDSS also treats children and families differently on the basis of race, color or national origin in making adoption placement decisions. Thus, OCR finds that SCDSS' placement policies and practices throughout Regions I-VII and in the state office violate Section 1808(c) and Title VI and its implementing regulations at 45 C.F.R. §§ 80.3(a), (b)(1)(i), (ii), (iv), (v), and (vi).

OPPORTUNITY FOR VOLUNTARY COMPLIANCE:

OCR provides recipients who have failed to comply with Title VI and its implementing regulations an opportunity to take corrective action necessary to remedy existing violations or to overcome deficiencies which may limit their ability to conduct their programs in a nondiscriminatory manner. OCR stands ready to assist SCDSS in securing voluntary compliance. If compliance cannot be secured by voluntary means, it may be affected by the suspension or termination of, or refusal to grant or to continue Federal financial assistance, or any other means authorized by law. Such means may include, but are not limited to a referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under applicable Federal law, assurance or contractual undertaking. 42 U.S.C. § 2000d-1 and 45 C.F.R. § 80.8.

Within thirty (30) days of receipt of this letter, SCDSS must submit a corrective action plan to OCR which contains appropriate measures addressing the deficiencies and violations discussed above. Acceptable remedial action will have to involve an obligation by SCDSS to: institute steps to have each region discontinue the placement practices that, as described in OCR's findings, impermissibly consider race, color or national origin; rewrite any policy identified by OCR as violative of Title VI and/or Section 1808(c); provide statewide training; and a commitment that SCDSS will implement the plan within six months of receipt of this notification.

Any acceptable corrective action plan must include the following remedy provisions and detail the timeline by which each remedy shall be accomplished and designate a person responsible for accomplishing the remedy:

1. SCDSS will rewrite and clarify policies and procedures prohibiting the use of race, color or national origin in making adoption decisions. SCDSS will review and, if necessary, rewrite and clarify policies and procedures prohibiting the use of culture as a proxy for race or national origin in making placement decisions. OCR must approve any proposed changes to these policies and procedures.

2. SCDSS will cease collecting and acting on birth parents' preferences concerning the race or national origin of adoptive parents. SCDSS will rewrite and clarify policies and procedures to reflect this change. Changes in policy and procedures will be approved by OCR.

3. SCDSS will modify forms as necessary, including SAPRI 30101, 12/99; DSS Form 30103, 10/01; DSS Form 3008, DSS Form 1575, and the Request for Prospective Adoptive Parents form. Modification of forms should include a notice on the form which solicits parental preferences that SCDSS cannot and will not consider birth parents' racial preferences in placing their child. All proposed modifications to forms must be approved by OCR.

4. Except when necessary to meet the best interests of the child as determined through individual assessments, SCDSS will cease the use of race, color or national origin in placement decisions.

5. Consistent with paragraph 4, above, SCDSS will cease subjecting families willing to transracially adopt to differential treatment, including extra scrutiny. SCDSS will rewrite all policies as necessary to reflect this change. SCDSS will train all staff to offer support and encouragement if parents have questions or concerns about adopting a child of another race or national origin. Changes in policy and training material must be approved by OCR.

6. SCDSS will rewrite all family assessments without regard to race, color or national origin or redact all information from family assessments with regard to race, color or national origin. SCDSS will modify policy and procedures as necessary. Changes in policy and procedures must be approved by OCR.

7. SCDSS will rewrite and clarify policies about using racial preferences of children. All proposed changes to policies and procedures must be approved by OCR.

8. For every family taken to placement committee, Adoption Specialists will be required to clearly articulate and document the reasons another family was considered more appropriate to adopt a child. Explanations shall include the needs of the child and why another family could better meet those needs than the denied family. Policies and procedures will be modified as necessary. OCR will approve changes to policies and procedures.

9. Consistent with paragraph 4, above, SCDSS must create progressive disciplinary action for any such use, which can include termination. SCDSS must also create whistleblower provisions for staff who report the use of race, color or national origin by other staff in placement decisions. Policies and procedures will be modified as necessary. OCR will approve changes to policies and procedures.

10. SCDSS shall train extensively on all these matters. Training shall emphasize the harm of racial discrimination and the harm to children who have their placements delayed or denied who end up forced to stay in foster care. Training materials shall be approved by OCR.

11. For the next five years, if anyone utilizes SCDSS procedures to appeal a SCDSS decision allegedly based on race, color or national origin, OCR must be provided with a copy of such appeal upon receipt and SCDSS' findings immediately after such findings are made.

12. SCDSS will monitor the number of transracial placements versus the total number of placements. SCDSS will track the average wait for placement for Black, White, Hispanic and Asian children and report annually to OCR for five years.

13. SCDSS will create a mechanism for monitoring its compliance with the above-referenced actions and any remedial action undertaken in response to OCR's investigation.

14. SCDSS will implement an accountability program to track child placement in connection with race and national origin. SCDSS will annually generate a report that includes the following information:

a) the SCDSS case number of each child for whom an adoptive placement was sought during the previous 12 months;
b) the race of each child for whom an adoptive placement was sought during the previous 12 months;
c) for each child for whom an adoptive placement was sought during the previous 12 months,
    (i) the racial breakdown [Black (Non-Hispanic), White (Non-Hispanic), Hispanic, Asian (non-Hispanic) and Bi-racial-Black/White (non-Hispanic)] of all parents identified as potential placements by the SCDSS matching system;
    (ii) the racial breakdown, as specified in (i) above, of all parents taken to all placement committees,
    (iii) the racial breakdown, as specified in (i) above, of all parents chosen by all placement committees as the first choice for the adoptive placement of the child, and
    (iv) the name of the Adoption Specialist(s) assigned to the case.

SCDSS will provide this report to OCR annually for five years.

SCDSS will also provide this report annually for five years to all supervisors of Adoption Specialists and to the SCDSS central office. SCDSS will use these reports as part of the evaluation and disciplinary processes for Adoption Specialists, in order to ensure that Adoption Specialists are not using race to deny parents the opportunity to adopt. SCDSS will also use these reports as part of its monitoring of compliance as specified in paragraph 13, above.

15. SCDSS will provide notice to all persons in South Carolina who are currently waiting to adopt or who applied to adopt since 1999 of the substance of OCR's findings. The notice shall inform individuals that they may raise with SCDSS concerns about any SCDSS action concerning adoption that they feel was racially motivated, and shall also inform applicants that they may have a private right of action under Section 1808(c) and Title VI. The notice will provide information about the SCDSS process for raising concerns about potentially racially-motivated actions by SCDSS. The notice will provide OCR's contact information. In addition, SCDSS will provide each of the individual prospective adoptive parents whose rights OCR found were violated (see the "Individual Violations" section of the Letter of Findings) with a notice that includes the information specified above, with a copy of OCR's Letter of Findings and with information about any action undertaken by SCDSS as part of the resolution of OCR's investigation. OCR will review and approve these notices.

16. For the next five years, all new parents applying to become adoptive or foster parents shall be given a similar notice, describing the substance of OCR's findings and notifying them of the SCDSS and OCR complaint processes and that they may have a private right of action under Section 1808(c) and Title VI if they are discriminated against. This notice will also address parents who are considering adopting a child transracially. It will offer SCDSS' promise to help such families overcome any fears or obstacles they may face in adopting a child of a different race or national origin. This notice will be approved by OCR.

PROHIBITION AGAINST RETALIATION:

Pursuant to 45 C.F.R. § 80.7(e), participants in this investigation may not be intimidated, threatened, or coerced by SCDSS or other covered representatives of the agency or other persons because she/he testified, assisted or participated in any manner in an investigation, proceeding or hearing held in connection with this review.

RIGHTS OF PERSONS TO FILE CIVIL ACTIONS:

Please note that OCR determinations do not affect the right of an aggrieved party to file a private civil action to remedy alleged discrimination by a recipient of Federal financial assistance.

DISCLOSURE OF RECORDS:

Under the Freedom of Information Act, it may be necessary for OCR to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information the disclosure of which would constitute an unwarranted invasion of privacy.

We will advise the Administration for Children and Families (ACF), also of DHHS, of our findings. ACF may make separate findings and determinations based on regulations and statutes it enforces. If ACF finds a violation, ACF may impose sanctions, including penalties in the form of reduced Title IV(E) funding to the State (up to a maximum of 5% of the State's annual Title IV(E) funding) and require adoption of a corrective action plan. 42 U.S.C. § 674(d)(1); 45 C.F.R. §§ 1355.38(b), (c).

As OCR found little deviation among the regional offices with respect to the placement of children on the basis of race, color or national origin, OCR will pursue corrective action measures with the state office, to be implemented state-wide. Therefore, as an administrative matter, please be advised that our office will close our reviews of the seven regional offices.

The OCR wishes to thank SCDSS for the courtesies extended to our staff during the course of this review. If assistance is needed with your compliance efforts, please do not hesitate to contact me as soon as possible at the address on the letterhead or by phone at (404) 562-7859.

Sincerely,

Roosevelt Freeman
Regional Manager

Cc: SCDSS Regions I-VII
ACF, DHHS, Region IV
ACF Headquarters