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### Title

Adoption from care: policy and practice in the United States

### Permalink

<https://escholarship.org/uc/item/8v7947ss>

### ISBN

978-1-4473-5103-0

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### Publication Date

2021

Peer reviewed

## **Adoption from Care: Policy and Practice in the US**

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In: Pösö, T., Skivenes, M., and Thoburn, J. (Eds.) (in press). *Adoptions from care*. Bristol: Policy Press.

Adoption was practiced in the US before the founding of the country and it has been legally codified since the mid-1800s. Layers of state and federal laws have since expanded the practice and today, the US stands out among nations in the number of children adopted overall, and the number of children adopted from care. This chapter provides a brief history of adoption practice and policy in the US, followed by an examination of current philosophical and practical aspects of adoption from care, and concludes with an assessment of future issues in the field.

### *< 2 > A brief review of US adoption history*

During the colonial period, adoption was used by the new European-American immigrants to secure legal heredity so that property or wealth could be passed from one individual to another (Carp, 2005). These were ‘private adoptions’ whereby the care and custody of a child was transferred from one (or two) parent(s) to another adult. Older children (typically boys) were the usual candidates for adoption (Freundlich, 2001); some boys also were adopted to secure their labor since the family was the primary economic engine of the developing country (Mintz, 2004). In 1851, the state legislature passed the Massachusetts Adoption Act, the first law to codify appropriate legal procedures surrounding private adoption. That law attended to the rights of birth

parents and adoptive parents. It also targeted the needs of children as unique constituents of the legal transaction (Carp, 2005).

Fast-forward to the 20<sup>th</sup> century and the phenomenon of private adoption flourished. During and after World War II, out-of-wedlock pregnancy rates rose significantly and the stigma associated with these births was high. At the same time, the infant mortality rate – which had been alarmingly high for centuries – began to fall. With the discovery of infant formula, infants could survive in settings separated from the birth mother (Carp and Leon-Guerero, 2005). These factors provided the main impetus for the supply side of the adoption equation. At the same time, private individuals, eager to start or expand their families, provided ample demand for healthy, white infants who needed a home. Adoption as part of child welfare became a practice specialism within social work to serve the interests of couples seeking adoption, and babies needing new homes. Child welfare staff were trained to serve as mediators in these private adoptions to facilitate the legal exchange of young children between families. Their job was to assess the appropriateness of prospective adoptive parents, and they focused many of their efforts on ‘matching;’ that is, they assessed children as ‘normal’ or ‘defective,’ and they carefully matched parents to children using categories of race, ethnicity, physical features, and religion (Gil, 2005).

These ‘matching’ practices ensured that, for example, white children would live with white families; Black children would live with Black families; protestant children would live with protestant families. The only group that experienced intentional race mis-matching, was Native American/ Alaska Native children. Adoption of tribal children into White homes was considered one strategy to deal with the ‘Indian problem’ in the US. That is, if Native American children could ‘pass as’ white, the hope was they would assimilate into the dominant culture and

longstanding issues of cultural difference and tribal sovereignty would decline. The federal government launched the *Indian Adoption Project* to promote adoption of Native American children into White homes and from 1958 to 1967, hundreds of tribal children were adopted out of their communities. In the 1960s and '70s, some estimates suggest that well over four-fifths of all tribal children in foster or adoptive homes were living with non-indigenous families (Unger, 1977).

With the advent of and greater use of effective birth control methods, along with reductions in the stigma associated with single parenthood, the supply of healthy babies available in the private adoption market declined. At about the same time, child welfare caseloads and public awareness about out-of-home care grew. By the 1970s, several factors drew public attention to the child welfare system and to adoption from care. Numbers in care were rising and emerging research showed the disquieting effects of lengthy stays in the out-of-home care system. Research showed that children who lingered in care often experienced instability, moving from one home to another; some child welfare agencies lost track of children's whereabouts altogether (Fanshel and Shinn, 1978).

African American children were especially likely to be placed in out-of-home care, yet the odds of adoption for African American children were low (Barth, 1997). Transracial placement – matching African American children with White families – grew modestly throughout the 1960s, yet by the early 1970s, the practice grew increasingly contested. In 1972, the National Association of Black Social Workers demanded a halt to transracial placements for African American children (NABSW, 1972). In their statement, transracial placement was equated with cultural genocide

and white adoptive parents were cautioned that they would not be able to adequately prepare black children to live with the racism prevalent in the US.

These tensions -- associated with race, foster care, and adoption -- gained political urgency and were finally expressed in 1978 with federal legislation governing the adoption of Native American children. The Indian Child Welfare Act (ICWA) set requirements for foster care placements, privileging placement with extended family, with the child's tribe, or with a different tribe (in order of preference); the law only allowed foster care placement with a non-relative non-tribal member if the privileged options were exhausted. During a child's stay in foster care, social workers were required to make active efforts to reunify the family. ICWA also set the standard for adoption very high, requiring courts to prove parents unfit 'beyond a reasonable doubt;' a very high legal bar.

Two years later, Congress passed and the President signed the Adoption Assistance and Child Welfare Act (AACWA/1980), a parallel law, designed for all children in the US., except tribal children, with some of the same intentions but somewhat different features from the ICWA. AACWA required states to make 'reasonable efforts' (rather than 'active efforts') to prevent foster care placement. Like its predecessor law, it also required states to pursue reunification with parents if out-of-home placement was required. Placement preferences were more diffusely defined as the "least restrictive (most family like) and most appropriate setting available and in close proximity to the parent's home, consistent with the best interests and special needs of the child" (U.S Social Security Act, sec. 475. [42 U.S.C. 675] 5(A)).

With the advent of AACWA, there were over 200,000 children in out-of-home care in the US. Many of these children had been in care for several years with little done to secure their long-term living arrangements. ‘Permanence’ became a central focus of the new law, imposing on public child welfare agencies an obligation to establish case plans for all children in care, and to prioritize efforts toward reunification with the birth family wherever possible. The law established limits on the amount of time parents were offered services to help secure their children’s return; thereafter, adoption was considered the second-best permanency option, though the legal bar of proof to terminate parental rights and pursue adoption was set as a ‘preponderance of the evidence’, a much lower standard than the bar set for tribal children.

Estimates from the early years following the AACWA suggest that about 17,000 children were in ‘adoptive placements’ in 1982 (though there are no reliable data on the number of these children whose adoptions were ultimately finalized). A decade later, about 20,000 children were adopted per year, and by the mid-‘90s, almost 30,000 children were annually adopted from care (Maza, 1984, Flango and Flango, 1994; Testa, 2004).

Some congressional leaders were impatient with the gradual increase in public adoptions. They also expressed frustration that public child welfare officials too often favored family preservation efforts over expedited permanency for children (see D’Andrade and Berrick, 2006). Legislators’ efforts to tilt the balance in favor of children’s rights to permanency, over parents’ rights to their children, resulted in the Adoption and Safe Families Act of 1997 (ASFA). That law further limited the amount of time parents would be offered services to promote reunification; it created a list of

“exceptional circumstances” that, if present, would allow child welfare agencies to bypass offering services to parents and expedite adoption; and it provided annual adoption ‘incentive payments’ to states that increased the number of finalized adoptions above an established base rate (D’Andrade and Berrick, 2006).

The number of adoptions from out-of-home care rose. In 2000, approximately 50,000 children were adopted in the US from the public child welfare system. A decade later, public adoptions rose another 16% to almost 60,000 children per year (Shuman and Flango, 2013) (see Table 1 for detail). Today, the US is referred to as an ‘adoption nation’; according to some estimates, we have a higher rate of adoption than any other country (Pertman, 2011). Recent estimates suggest that the annual number of adoptions has stabilized at close to 60,000 per year (US DHHS, 2018), accounting for about 40% of all adoptions nationwide (the other 60% are accounted for by international and private adoptions) (Vandivere, et al., 2009).

Table 1 Trends in Adoption in the US<sup>1</sup>

| Year | Children in out-of-home care <sup>2</sup> (Rate per 100,000 children). | Number of Public Adoptions from out-of-home care <sup>3</sup> | Rate of adoptions from public care per 100,000 children <sup>4</sup> | Number of Inter-country adoptions | Rate of Inter-country adoptions per 100,000 children |
|------|--|---|--|-----------------------------------|--|
| 2003 | 510,000<br>(697)   | 50,355  | 68.8   | 19,237 <sup>5</sup>               | 26.0   |

|      |                  |        |      |                     |       |
|------|------------------|--------|------|---------------------|-------|
| 2005 | 513,000<br>(697) | 51,323 | 69.8 | 20,679 <sup>6</sup> | 28.1  |
| 2010 | 408,525<br>(551) | 52,340 | 70.6 | 12,149              | 16.4  |
| 2015 | 427,910<br>(581) | 53,549 | 72.7 | 8,650 <sup>7</sup>  | 11.75 |
| 2018 | 437,283<br>(595) | 63,123 | 85.9 | 4,059 <sup>8</sup>  | 5.5   |

< 2 > *Adoption today*

Adoption is considered an essential permanency option for children who cannot return home in part because the alternative of long-term foster care with non-relatives is generally considered detrimental to children’s well-being. Too many children experience impermanence in foster care, where they endure sequential relationships that are neither enduring nor legally enforceable (Testa, 2005). Adoption, by contrast, confers considerable benefits to children including rights to inheritance and in some instances, greater financial security during childhood. Some evidence also indicates that adoption offers children a sense of stability and belonging that is different from the experience of foster care (Brodzinsky et al, 1998). Adoption is also a relatively stable



phenomenon; the disruption rate is very low. Some estimates indicate about 8% (Rolock, 2015); others suggest closer to 5% (Rolock et al, 2019) of adoptions disrupt. Foster care, in contrast, is a relatively impermanent setting for children, which can be especially consequential when young children are placed in care. The large majority of entries to care in the US are for children under the age of five (US DHHS, 2019). Given the tender age of so many children in foster care, the prospect of long-term foster care is considered highly problematic. As a result of the age distribution of children in care, and a generally accepted view that children should not be raised in care long-term, the majority of children adopted are quite young. One study of a nationally representative sample of adoptive families found that only 20% of children were older than age six at placement into the adoptive home; almost half (45%) were under one year of age (Malm, et al., 2011). According to the most recent data available, the mean age of adopted children in 2018 was 6.1 years; 49% were male; approximately half of children adopted in 2018 (49%) were White, 21% were Hispanic, and 17% were Black or African American (U.S. DHHS, 2019). Although over 100,000 children are typically available for adoption from foster care every year (US DHHS, 2019), some children have lower likelihood of being adopted. African American children are about 38% less likely to be adopted compared to White children, and children with mental health problems are less likely to be adopted; children with other disabling conditions, however, are more likely to be adopted (Akin, 2011).

Adoption is not the only permanency option for children in foster care. For children placed with relatives, adoption may not be an appropriate outcome in part because relatives may be reluctant to see the termination of parental rights for another family member. Instead, legal guardianship is used increasingly as an appropriate permanency option. Under guardianship, a judge transfers the

care and custody of the child, but the birth parent retains his/her legal rights of parenthood. Under these arrangements, a parent can petition the court for the child's return, should safety conditions at home substantially improve. Because adoption is considered more legally binding than guardianship, it is preferred as a permanency opportunity, particularly for children living with non-relatives, though an older child's wishes would likely be considered if guardianship were strongly preferred. Although there is growing interest in legal guardianship for children placed with kin, adoption is still pursued for many. In one study of adoptive families, 17% of adoptive parents were relatives previously known to the child and an additional 6% were relatives unknown to the child (Malm et al., 2011).

In spite of the positive regard and philosophical orientation toward adoption, a number of legal barriers exist to guard against its excesses. Adoption policies vary considerably in each of the 50 states, but some general parameters shape the process. Typically, parents are offered services from child welfare agencies, along with time to use these services to improve the safety of their home and parenting following a child's removal and placement in care. Once the time frame and services end, a social worker recommends to the judge a permanent plan for the child. This preferred plan is reunification, but if a return home is not possible, adoption may be recommended. Prior to an adoption decision, a number of court hearings may occur including the determination to terminate parental rights for each of the parents. The legal threshold for this decision was changed in 1997 under the Adoption and Safe Families Act and is now based on "clear and convincing evidence." (As described above, the standard for tribal children is higher. A decision that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," must be established "beyond a reasonable doubt" (National Indian Law

Library, 2019.)) Throughout the entire process, parents are provided free legal counsel if they are low-income, or they can secure legal counsel on their own. In several states, children are also assigned a lawyer, and the public agency also argues its case through legal counsel.

Parents have rights to appeal each decision, including the determination to terminate parental rights. Depending on the age of the child and the state in which the child lives, the child may be invited to share his/her view about adoption as well. Appeals by one or more parties can be frequent, usually resulting in delays to the adoption process. The right to appeal, however, is designed to ensure equal protection for parents and children against capricious actions by the state. Once the time period for all legal appeals has elapsed, a child is considered legally free for adoption.

Across states, some other general principles apply, though there is great variability in policy and practice. The 'best interests of the child' is the standard used to determine if adoption is appropriate. Because adoption is not possible until after termination of parental rights has occurred, the focus of judicial proceedings is not on the birth parent(s), but is focused solely on the child. One way to make a relevant best interest determination is to ask the child about his/her wishes. Depending on the state, children ages ten or older are typically asked to express their views and are asked for their consent. Finally, adoption decisions are usually confidential. Unless there is agreement among the parties, the birth parent may not know the identities of the adoptive parents, and the child's name and birth certificate are usually changed and related documentation is re-issued by the state (Hollinger, 2012).

Following adoption finalization, adoptive parents typically receive an initial tax credit; thereafter they usually receive a monthly subsidy, similar to the foster care subsidy, until the child turns 18. These federal subsidies are available to children who are categorized as ‘special needs’ or ‘hard to place’ (NACAC, 2019). Given that the large majority of children in foster care hail from disadvantaged backgrounds or have one or more health, developmental, or mental health conditions (Burns, et al., 2004), most children are considered eligible (federal data indicate that 93% of adoptive parents receive an adoption subsidy (US DHHS, 2019)). In fact, one study showed that about half of children adopted from care had a special health care need (Malm et al, 2011), approximately half of boys adopted from care utilized mental health services as did almost two-fifths of girls (Tan and Marn, 2013). Adopted children are entitled to publicly funded medical and mental health care (Medicaid) until age 21, some are covered up to age 26 through the Affordable Care Act, and others may be covered by their adoptive parents’ employer-sponsored health insurance (CWIG, 2015). Some evidence suggests that the economic supports offered to families are an important incentive promoting adoption for children who would otherwise remain in foster care (Argys and Duncan, 2007). Other evidence shows that public expenditures for adoption are less than foster care due to reduced court costs, social worker costs, and other service needs (Zill, 2011).

### < 3 > *Future issues in adoption*

Some aspects of adoption practice are changing rapidly and dramatically in the US in part as a response to the changing composition of adoptive families and in response to changes in the social environment. Adoption from care evolved in parallel to private, independent adoptions based on many assumptions of privacy, confidentiality, and secrecy (Carp, 2004). Today, however, the

majority of children adopted from care are adopted by their foster parents (52%), or by a relative (36%) (US DHHS, 2019). As such, children, foster /adoptive parents, and birth parents are typically known to one another before adoption proceedings begin.

When all members of the adoption triad (birth parent, adoptive parent, child) are known to one another, open adoption is often pursued. Open adoption may involve a variety of strategies to maintain contact between children and birth parents including annual cards or letters, phone contact, or regular meetings. Grotevant and McRoy have referred to open adoption as a 'continuum of openness' (1998), given the variety of family preferences. Many states have allowed open adoption agreements to be instated at the point of adoption. These are typically non-binding agreements that set the parameters for parties' hopes and expectations more than requirements. Sometimes arrangements for openness are mediated by the state; other families make arrangements informally. Evidence from one study indicates that about two-fifths of adopted children have had contact with their birth family following adoption (Malm et al., 2011). Research on open adoption suggests that the agreement guidelines are usually followed during the early years after the adoption but that the frequency of contact between birth parents and children usually declines over time (Berry et al, 1998). In general, the research on outcomes for children experiencing open adoption are neither positive nor negative (Grotevant et al, 1999); one national study of children adopted from care found no differences between children whose adoption was open compared to children whose adoption was closed (Vandiviere and McKlindon, 2010).

Adoption contact agreements may be between birth parents and children and they may also be between siblings who are separated. Some evidence suggests that sibling relationships are especially meaningful and important to children in care (Herrick and Piccus, 2005), so their separations through foster care or adoption require especially thoughtful consideration and open adoption agreements can help in that regard. Increasingly, however, siblings are often placed together in the same adoptive home, either simultaneously, or sequentially. In one national study, over four-fifths of adopted children from foster care had a sibling also placed in foster care; about two-fifths saw their sibling adopted into their adoptive home with them (Malm et al, 2011).

Just as attitudes about privacy and secrecy in adoption are changing, so are cultural mores about who is an appropriate adoptive parent. Over two-thirds of adoptive parents (68%) are married or unmarried (3%) couples, but the number of single adoptive parents is rapidly rising and well over one-quarter of adoptive parents are single (25% female; 3% male) (US DHHS, 2019). In some states, efforts to recruit adoptive parents from the LGBTQ community are also robust. Training and support for social workers has expanded significantly in the US to address prejudices and stigma (Mallon, 2008). Nevertheless, in some states, adults who are LGBTQ are discouraged from pursuing adoption and another handful allow private, non-profit agencies to deny opportunities for public adoption to members of the LGBTQ community (Agosto, 2012).<sup>9</sup>

Discussions about sexual orientation and its appropriateness for care mirror historical debates about the role of race and transracial placement in the field of adoption (for a discussion see:

Bartholet, 1991) and before that, the role of religion in trans-religious placements (for a discussion see: Pfeffer, 2002). But Congress effectively ended the debate when they passed the Multi-Ethnic Placement Act in 1996, prohibiting states from denying or delaying foster or adoptive placements based on the race or ethnicity of the child or of the prospective foster or adoptive parent. In the most recent national study, about one-quarter of children (28%) adopted from care were living in transracial, transethnic, or transcultural households (Malm et al, 2011) and the research evidence on outcomes for children in transracial adoptive homes is generally positive (Vandiviere and McKlindon, 2010). The Multi-Ethnic Placement Act was passed, in part, based on the argument that denial of transracial placements was racially discriminatory and therefore illegal under the equal protection clause of the U.S. constitution.

Ten states currently allow state-licensed child welfare agencies to refuse to work with LGBTQ individuals or couples if such work conflicts with their religious views (Movement Advancement Project, 2019). Whether Congress will pass similar legislation to ban discrimination against the sexual orientation of adoptive parents is unlikely in the near future. Adherents of the ban on LGBTQ families argue that forcing private agencies to serve LGBTQ families is antithetical to their religious convictions; efforts to force agencies to work with LGBTQ parents thus violate the first amendment right to Freedom of Religion. Critics of the ban, however, refer to the equal protection clause of the constitution and argue that their right to publicly-funded adoption services cannot be abridged.

Other topics likely to garner significant attention relate to the needs of children following the adoption decision. A good deal of research suggests that raising children who hail from foster care can be challenging for many families (Hill and Moore, 2015, Good, 2016). The large majority of children in foster care have health, mental health, or developmental challenges that require a highly effective caregiving environment (Berrick and Skivenes, 2012). As such, demand for post-adoption services is high. Unfortunately, many adoptive parents who need services indicate that services are unavailable or services do not meet their needs (Adkinson-Bradley et al, 2012). As such, demand for post-adoption services is likely to continue to be an important issue in adoption policy discussions; determining whether federal, state, or local jurisdictions are responsible for financing these services and for how long, will be contested.

The most difficult adoption issue likely to shape policy and practice in future years relates to the Indian Child Welfare Act (ICWA), the 1978 law described previously that set strict conditions under which tribal children could be adopted.

ICWA was designed to “protect the best interests of Indian children and promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which (will) reflect the unique values of Indian culture” (ICWA, Congressional Declaration of Policy, 1978, Section 1902). It placed significant restrictions on state and local governments to limit the separation of children from their parents; it created placement preferences so that if children were separated into foster care, they would remain with their extended family,



in their own tribe, or in another tribe; and it set a very high bar for terminating parental rights. The goals of ICWA were to cede to the tribes authority to care for their own children, as well as limit the likelihood that children would be separated from their family, their tribe, and their cultural heritage.

Advocates for the law point to the importance of tribal bonds and suggest that the best interests of the child can only be considered when children have the opportunity to grow and develop within their tribal identity (Cross, 2014). In short, cultural continuity, it is argued, is always in the best interests of the child (Weaver & White, 1999). Critics, however, suggest that ICWA places the tribe's interests over the interests of individual parents, particularly if or when individual parents' tribal affiliation has no personal meaning. As such, ICWA has the potential to pit parents' rights against tribal community rights, with the law favoring tribal community rights.

The law has been tested before the U.S. Supreme Court in a 2013 decision (see: *Adoptive couple v Baby girl* (570 U.S. \_\_\_ (2013))). In that case, a toddler was ultimately allowed to remain with her non-tribal parents, but the judges demurred on the merits of ICWA's preferential restrictions. A new case, much debated in child welfare circles, is likely to make its way to the U.S. Supreme Court as well. In that case (*Brackeen v. Bernhardt*), critics argue that ICWA hinges on racial preferences which, under the equal protection clause of the 14<sup>th</sup> amendment, should be viewed as unconstitutional. Advocates for ICWA argue that the placement preferences in ICWA are based on the rights of tribal sovereign nations and that race is not a factor. If ICWA is overturned, the decision would have far-reaching implications for adoption and many unrelated issues relating to tribal sovereignty in the U.S.

## < 2 > *Conclusion*

Adoption has long been used in the U.S. as a strategy to secure legally binding and lasting relationships for children who have been separated from or who have lost their parents. Today, large numbers of children are adopted from care, though over 115,000 remain in care with an ultimate ‘goal’ of adoption (US DHHS, 2019). Some of these children will be eventually adopted; others may transition to guardianship, and some may be reunified. The notion of ‘permanency’ for children has been taken quite seriously in the U.S. Some states have aggressively pursued permanency opportunities, dramatically reducing the proportion of children who remain in care long-term (see Magruder, 2010).

A number of federal policies have been developed to incentivize and support adoption in the US. Today, adoptive parents receive financial support through tax credits and direct payments, and states can receive financial benefits from the federal government when the number of annual adoptions rise. There is no sign in the U.S. that enthusiasm for adoption is in decline. Quite the contrary. Both the demand for children among adults hoping to start or grow their family, or to make a difference for others, and the supply of children with little prospect of returning to their original family, suggest that adoption is likely to continue to be viewed as a viable strategy for securing children’s future.

Recent debates about the Indian Child Welfare Act have exposed some of the challenges associated with privileging community / tribal rights over the rights of individual parents or individual children, however that debate has not been considered relevant to non-tribal children, who represent the vast majority of all adopted children in the U.S. In the larger U.S. community, children’s rights to permanency prevail in most adoption discussions, ensuring that the practice will likely continue for some time to come.

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<sup>1</sup> Data on the number of children adopted privately in the U.S. are not available.

<sup>2</sup> Data are derived from AFCARS reports #10 - #26 (U.S. Department of Health and Human Services. The denominator is derived from the U.S. Census and includes all children ages 0-17. The numerator is derived from AFCARS and since 2009 includes all children ages 0-20; 0-17 prior to 2009. Youth ages 18 and older typically represent less than 10% of the total out-of-home care population.

<sup>3</sup> Data are derived from AFCARS reports #10 - #26 (U.S. Department of Health and Human Services.)

<sup>4</sup> Data are derived from <https://www.census.gov/programs-surveys/popest/data/tables.2010.html>

<sup>5</sup> Data noted here are from 2001. Data shown in table from 2001 to 2010 are derived from the following report: Global trends in international adoption: 2001-2010. Retrieved 12/21/2019 from:

[https://www.adoptioncouncil.org/images/stories/documents/ncfa\\_adoption\\_advocate\\_no44.pdf](https://www.adoptioncouncil.org/images/stories/documents/ncfa_adoption_advocate_no44.pdf)

<sup>6</sup> Data noted here are from 2006

<sup>7</sup> Data noted here are from 2012 derived from Child Welfare Information Gateway (DATE). *Trends in U.S.*

*Adoptions*. Retrieved 12/21/2019 from <https://www.childwelfare.gov/pubPDFs/adopted0812.pdf>

<sup>8</sup> National Council for Adoptions retrieved 12/21/19 from:

<https://www.adoptioncouncil.org/blog/2019/03/fy2018-intercountry-adoption-report-released>

<sup>9</sup> Public child welfare agencies may not discriminate based on race, national origin, religion, or sexual orientation.

Private agencies (usually religiously affiliated) are not held to the same standards relating to discrimination, though



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many provide adoption services to children in foster care. On Nov. 1, 2019, the Trump administration announced a new federal rule that would allow discrimination against LGBTQ prospective adoptive parents.