

# The New Interstate Compact *for* the Placement of Children (ICPC):

## FAQ's Regarding Private and Independent Adoptions

In an effort to continue educating the states and other interested parties about the new Interstate Compact for the Placement of Children (ICPC or Compact), APHSA is providing a series of "Frequently Asked Questions" (FAQ) to address various concerns regarding the New ICPC. The questions and answers below address private and independent adoption concerns regarding the New ICPC. Additional information will be provided as received.

### **Question 1: Why should private and independent adoptions be regulated under the New ICPC if state regulation and licensing requirements already exist and state courts have the authority to ensure that laws are followed?**

State laws, licensing requirements and regulatory agencies do not adequately provide the necessary safeguards to address the needs of children placed across state lines largely due to jurisdictional limitations, hence the need for a cooperative document like a compact. The laws and licensing requirements for private and independent adoptions vary from state to state. While some states' licensing laws and requirements are fixed and comprehensive, some are not. The purpose of the ICPC is to provide protections to children placed across state lines for purposes of foster care and adoption. Most state regulatory agencies only provide periodic licensing checks and or audits annually, bi-annually or at some other interim timeframe. The New Compact gives each child placed in an interstate placement for foster care or adoption individualized attention and protection through case (child and prospective placement resource) assessments and certification of observance and compliance with applicable state and federal laws and their accompanying licensing requirements. Regulatory oversight at a macro level does not provide the necessary case-by-case attention which is critical to adoptive parents, birth parents and children to ensure that all parties are protected and children are placed in safe and suitable placements.

Similarly, state courts and judges presiding in interstate cases and interstate adoptions are not positioned to provide the necessary safeguards that would be available under the New ICPC. In many states and counties, judges rotate their posts within the state court system and do not preside solely over adoption or child welfare cases. They are often unfamiliar with the necessary processes or intricacies of interstate cases. Absent the New ICPC, judges would need to know the state laws and licensing requirements in their state as well in any state from which they receive children or any state to which they send children. State adoption laws differ, procedures involving parental consent, relinquishment of children and legal and putative fathers differ as do many aspects of each State's Code. The New Compact puts in place procedures and establishes accountability which ensures that children in interstate cases are protected despite state differences.

For example, it is not uncommon for birth parents to consent to an adoption in a state where such consent is valid but which is in violation of the laws of their own state. This creates an opportunity for the adoption to be reversed or eventually to disrupt.

Legal matters involving legally recognized fathers, fathers legally separated or divorced from birth mothers and living in another state also raise an array of legal and logistical problems which may further complicate the already complex process in interstate adoptions. The New Compact provides a mechanism for ensuring that the applicable laws of each state are followed.

Of paramount concern, whether processed as a public, private or independent adoption, is the possibility that an adoption may disrupt or dissolve. If disruption occurs prior to finalization or dissolution occurs after an adoption is finalized and the private and/or independent adoption agency or attorney is no longer involved and acting on behalf of the birth mother/father or adoptive parent (s), the state child welfare agency is required to assume custody of the child. Clearly, this outcome is a negative one for the child, adoptive parent(s), and the state. The primary goal of the Compact is to ensure that all interstate adoptions have the greatest opportunity possible of success. One safeguard established by the New Compact is that the applicable laws of each state involved are observed and followed so the interests of all parties involved are protected.

## **Question 2: Why aren't the regulations included in the language of the New ICPC?**

Regulations are not included in the language of the New ICPC to preserve the utility, purpose and function of the Compact. This design was intended by the framers to allow the New ICPC to be responsive to changes in foster care and adoption environments without the need to re-draft or change the Compact itself.

All interstate compacts provide a foundation for cooperation between parties regarding the terms of the compact and once enacted in a state become part of that state's laws. Rules and regulations, on the other hand, serve a separate function in that they create mechanisms to carry out the provisions of a compact. The New Compact establishes rulemaking procedures that are consistent with those required for a state or federal agency. The New Compact creates a process under which rules can be made and enforced and, when necessary, be modified without returning to each state legislature. This structure provides fair and efficient means to address matters which may affect interstate placements in the future. It would be a mistake to include rules and regulations in the body and substantive language of the Compact. Many critics of the current ICPC and Compact Administrators alike acknowledge that many of the administrative processes, which are written into the standing ICPC, are outdated and cause delays in ICPC placements. Because of the structure of the New Compact, in the future such matters can be addressed as necessary through rules and regulations.

Rules and regulations are reserved for deliberation and discussion once the Compact is passed and signatories to the Compact convene and create rules that will facilitate and support the effectiveness of the New Compact. Rules and regulations developed and initiated in this manner provide flexibility in addressing issues as they arise. As a safeguard of states' authority, the

drafters included a provision which allows a majority of the member state legislatures to vote to nullify any rule passed by the Interstate Commission.

**Question 3: What enforcement provisions are included in the New ICPC?**

The new ICPC includes a new and improved legal framework that will strengthen member states' enforcement authority. Compliance and enforcement will be encouraged by the use of a range of measures, from technical assistance and alternative dispute resolution, including mediation and arbitration, to suspension, termination, and legal action in federal court with fees and costs awarded to the prevailing party. In addition, the New Compact will have a staff and committee structure in place that will permit swift identification of potential problems and a manageable process for addressing concerns of member states in a timely manner. This ability to address accountability and compliance concerns meaningfully will create an environment in which states will work cooperatively to avert major conflicts. The avoidance of such conflicts can only increase the protection of the children whose only advocate of last resort is often the state.

**Question 4: How will the rulemaking process differ under the New ICPC as compared to the current ICPC?**

The rulemaking process will differ under the New ICPC in a number of ways. First, the New ICPC requires customary due process procedures, including advance notice and publication of rules promulgated by the governing authority, adequate opportunity for debate and deliberation by the party states, and an opportunity for public comment. The current compact, however, does not provide any details or limitations on the manner in which the rules are currently promulgated nor the parameters of the types of rules that can be created.

Additionally, by linking the process of the development of the rules in the New Compact with the principles of the Model State Administrative Procedures Act, the rules of the New Compact will be given legal status that will be recognized by the courts and more enforceable between the states.

The governing structure described in Articles VIII, IX, & X of the New Interstate Compact for the Placement of Children is conceptually like the existing one. The major difference in the New Compact is that an interstate administrative body made up of state representatives will be created (Interstate Commission) with more explicit authority to promulgate rules and regulations. This Commission will have the ability to remedy issues such as the lack of uniformity in administration and interpretation that prevent or hinder administrators of the current ICPC from placing children from one jurisdiction to another in both a safe and efficient manner. In addition, acknowledgement and conformity from state courts in giving full faith and credit to the Compact will enhance uniformity and consistency in the application of the ICPC from state to state. The Interstate Commission will also provide a forum which will promote greater accountability among the member states.

**Question 5: ‘What level/type of personnel will be permitted to serve as part of the rulemaking body?’**

The level of personnel permitted to serve as part of the rulemaking body may be determined in a number of ways: by the signatory states, the Interstate Commission bylaws, and (or) rules and regulations. In many states, the person who has the authority to make decisions which will bind the state is currently authorized to administer the ICPC. It is anticipated that the initial rulemaking body of the New Compact will also include those vested with the authority to make decisions which bind the state. Member states of the new Compact may decide to stipulate through the bylaws and (or) rules and regulations, the position within a state and the level of education and experience required of individuals who serve on the Interstate Commission.

The beauty of a compact is that it permits members to provide the necessary safeguards for effective processes through rules, regulations and or bylaws. For example, members of the Commission could decide to include advisory requirements such as rules to ensure legal, practical and policy considerations are included in all discussions of a new rule or regulation or change to any existing rules or regulations and that all Interstate Commission representatives have been properly advised and given all pertinent information before voting to implement a rule.

**Question 6: How will the states and the New ICPC address state requirements which delay ICPC processing?**

The language of the New Compact lays the foundation for states to act uniformly in processing interstate placements. The New ICPC provides a strong legal framework that will require member states to comply and cooperate with the provisions of the Compact. The rules and regulations developed by the Interstate Commission will delineate the provisions of the New ICPC and address administrative processes which have the potential to cause delays. The New Compact will have a staff and committee structure in place that will permit swift identification of potential problems and a manageable process for addressing concerns of member states in a timely manner. Accountability of and compliance from member states will be encouraged through the use of technical assistance and alternative dispute resolution. When enforcement of the New Compact is necessary, the member states will have the tools of mediation and arbitration, suspension, termination, and legal action in federal court available to them. The ability to address accountability and compliance concerns, which is integral to the structure of the New Compact, will help states to identify problems before major conflicts occur and provide members with a final resolution forum in the federal courts if a disagreement can be resolved in no other way.

**Question 7: Why does the New ICPC require individuals involved in private and independent adoptions to make a request for an assessment through the public child placing agency in the sending state and upon completion require approval from the public child placing agency in the receiving state for interstate adoptions?**

The New ICPC requires that an assessment for a private or independent adoption be requested through the public child placing agency in the sending state and upon completion, approval by the public child placing agency in the receiving state to provide both the sending and receiving states with proper notice of an interstate adoption. This procedure ensures that children placed across state lines are afforded the protections which are required by federal and state law and guaranteed under the New ICPC. The rules which will govern the administrative processes used in interstate placements will be established under the principles of the Model State Administrative Procedures Act. The key to rules and regulation developed through this process is for private, public and government entities to be actively involved so that the resultant product is as simple, fair, and efficient as possible. Clearly the joint effort and cooperation of all involved will help to expedite safe and timely interstate placements.

For example, hypothetically, the process for requesting an assessment can occur by providing notice that an assessment is needed within a particular state by submitting a request electronically and receiving verification of the request electronically. Furthermore, the private placement agency could be at liberty to use an approved (licensed) agency/worker from an official list to conduct the assessment within the receiving state, thereby not increasing the work load of existing state staff or creating the need for states to increase their child welfare staff. Upon completion of the assessment, the public agency in the receiving state could provide approval or denial electronically within a set (specified) number of days to the sending state and private or independent agents involved. The Interstate Commission could determine through the rules and regulations how and when the ICPC offices would function through this process.

**Question 8: Why are the time-lines, standards, procedures and information required for conducting assessments undefined and not included as part of the New ICPC?**

Time-lines, standards, procedures and information required when conducting assessments are an intrinsic part of the administrative process. Administrative processes ultimately operationalize the Compact and should be defined within the rules and regulations. More importantly, there are a number of variable elements to be considered when the New ICPC is enacted by the 35 states required to make the Compact law. These variables may include changes or advancements in areas of legislation and court decisions, federal and state policy, practice, technology and environment. It would be imprudent to include administrative processes before member states have the opportunity to discuss important factors which may have a direct impact on interstate placements. To include such matters in the substantive articles of the New Compact would remove the ease and flexibility available to address timely challenges and to modify rules without returning to each state legislature.

**Question 9: How will the administration of the New ICPC differ from administration of the current ICPC and its cumbersome and bureaucratic processes?**

The states and the Interstate Commission will have full opportunity and authority to remove the cumbersome, bureaucratic and unnecessary aspects of the current ICPC. By creating rules, regulations and administrative processes and by clarifying the role, duty and responsibility of the

ICPC offices throughout the states, the Interstate Commission can remove jurisdictional and procedural barriers which have been proven to cause delays in interstate placements.

For example, one of the many barriers recognized in the current ICPC process are the different requirements states have for processing ICPC paperwork and for obtaining timely home study requests and reports. The Interstate Commission, in its charge to establish rules, may include common elements from member states and private, public and other external organizations and promulgate rules and regulations to ensure uniformity and consistency in the processing of interstate cases throughout the country.

It is well settled that the existing interstate agreement has been severely compromised by individual state actions. States have unilaterally determined the meaning and coverage of the compact, changed the statute, and changed the process and procedures for interstate placements. There is no longer common agreement between states concerning placements of foster and adoptive children. One of the many reasons it is imperative and urgent that the states move forward to enact the New Compact is so states can begin developing a new, improved, and uniform process for interstate placements.

**Question 10: Will the Interstate Commission function as a Super Legislature and is such a rulemaking body permitted by the Constitution?**

The idea that the Interstate Commission is potentially a Super Legislature is a misconception of the function and eventual capacity of the Interstate Commission as provided for within the New ICPC. The New Compact provides for authorized representatives of the member states “. . . *who acting jointly with like officers of other party jurisdictions, shall have the power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact*” (see ICPC, Article VII).

Much has been made of the fact that provisions of the compact would supersede conflicting state laws as adopted under Article XVII (a) (2) of the agreement. All interstate compacts supersede conflicting state law whether this is clearly stated within the language of the compact or not. Compacts are used to engender and ensure cooperation and agreement in specific interstate matters when two or more states are required to interact in accomplishing common goals; their purpose is not to supersede individual state laws. To permit a state to unilaterally amend a provision of an interstate compact by enacting a conflicting state law would defeat the need and purpose of using the Compact or a compact at all. For example, if the member states to a compact agree that for purposes of interstate placements, the age of majority is x, then when two or more member states are processing an interstate placement, the age of majority must be x.

The constitutional validity of the authority of states to enter into interstate compacts and delegate rulemaking authority to an interstate agency created under the compact was specifically recognized and upheld by the U.S. Supreme Court in the case of *West Virginia, ex rel Dyer vs. Sims*, 341 U.S. 22 (1951). In deciding this issue the Court observed, “*That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government.*” Referring to the delegation of such power to an

administrative agency as a “*conventional grant of legislative power*” the court upheld the validity of the compact rule in question. Given the Supreme Court’s decision in *West Virginia, ex rel Dyer vs. Sims*, the legislative delegation of rulemaking authority to an interstate compact agency (such as the Interstate Commission included in the New ICPC) is not conceptually different from that granted by a state legislature to one of its in-state administrative agencies. Accordingly, such delegations of authority are subject to the limitation that the rules promulgated do not exceed the scope of the statutorily delegated authority. Therefore, it is critical that the authority to make rules be clearly articulated in the compact language as provided for within the New ICPC.