

UNDERSTANDING THE INTERSTATE COMMISSION

1. *What is the Interstate Commission?*

The proposed governing structure described in Articles VIII, IX, & X of the Interstate Compact for the Placement of Children is conceptually like the existing one. An interstate administrative body is created (Interstate Commission), made up of state representatives with more explicit authority to promulgate rules and to enforce compliance with the new compact. This increased authority will remedy the issues of lack of uniformity in administration and interpretation of the compact that plague the current ICPC and will promote greater accountability among the member states.

2. *Why is it necessary for the proposed compact to have a more formal governance structure?*

The new governing structure will address: (1) the inability of member states to ensure adherence to the rules developed by the current Association of Administrators of the ICPC, (2) the lack of accountability of member states in developing the rules, (3) the unenforceability and differential interpretation of the rules and requirements of the compact by the courts and agencies administering it, and (4) the lack of enforcement tools to ensure compliance with the compact. In summary, the current compact lacks a needed formal governing structure that is essential in order for the proposed compact to function effectively.

3. *Why are there so many provisions regarding procedures for openness of the records and meetings of the Interstate Commission? (Article VIII, G, H, I)*

Provisions regarding procedures for openness of the records and meetings of the Interstate Commission are provided because of concerns about discrepancies in state laws governing open records and meetings. For that reason, the proposed compact provides uniform standards for open meetings and records and are based on the principles of the federal open meetings and records statutes found in the “*Government in Sunshine Act*” 5 U.S.C. s552(b).

4. *Why is there so much language in the proposed compact dedicated to the powers, duties, organization, and operation of the Interstate Commission? (Articles IX & X)*

Since the Interstate Commission is, in effect, an administrative agency of the collective members of the compact, the language must provide, in sufficient detail, its composition, character, internal management, and powers. Without providing resolution of these issues in the compact itself, the question would inevitably arise as to which laws were to be applied to the Interstate Commission. Upon enactment of the compact, these provisions will govern the Interstate Commission in each of the party jurisdictions.

5. *What is the reason for the indemnity language concerning lawsuits against the interstate commission, its officers, and staff in Article X?*

State officials, including those engaged in activities concerning the placement of children, are generally protected from lawsuits under the sovereign immunity provided to most state employees. The U.S. Supreme Court has held that immunity protection will not be presumed to apply, in the context of administering an interstate compact, unless there is good reason to believe (such as the language of the compact provisions) that the states structured the compact with the intent to protect it with their own immunity (see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)). The language in Article X is designed to leave no room for doubt in the mind of a reviewing court that the states entering the proposed compact intend to “immunize” the officials involved in administering the compact and to provide for their

legal defense in the event that they are sued, unless the alleged injury to another occurs as a result of a willful, intentional, or malicious act that is clearly outside the scope of authority under the ICPC.

6. *Why is it necessary to provide for such a lengthy explanation of the rulemaking process in the new compact and what limitations are provided? (Article XI)*

The rulemaking functions of ICPC governing body are not new. The current compact, from its inception, has provided for the 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). 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. Article XI of the proposed compact provides more accountability to the member states and those potentially affected by the rules in the rulemaking process. The proposed compact establishes rulemaking procedures that are consistent with those required for a state or federal agency. It insists upon 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. By linking the process of the development of the rules in the proposed compact with the principles of the Model State Administrative Procedures Act, the rules of the proposed compact will be given legal status that will be recognized by the courts and more enforceable between the states.

7. *Is rulemaking by an interstate compact agency permitted by the U.S. Constitution?*

Yes. 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 proposed 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.

8. *Since the rules under the proposed compact will not be developed until after it is enacted, doesn’t that mean that states are expected to sign a “blank check” before knowing what is contained in the rules?*

Because the proposed compact must be adopted by a minimum of two-thirds (35) of states before it becomes operational (including its ability to make rules) it will be necessary for member states to “trust the process” for the proposed governing commission to promulgate appropriate rules. However, as already discussed, there are substantial safeguards built into the process by which the rules will be promulgated, allowing for full and fair deliberation, debate, and public comment prior to adoption of the rules. It is also important to keep in mind that the governing body will not be “writing rules on a blank slate.” This is because a substantial body of rules and regulations, which have already been promulgated over the decades of the existence of the current compact, have provided extensive experience for compact administrators to

know which rules are working well and which rules are “broken” and should be discarded or that need revising.

9. *What safeguards exist in the event that a state or minority group of states disagrees with a particular rule or rules?*

The governing commission is comprised of one voting representative from each member state. These representatives are entitled to receive advance notice of all proposed compact rules governing structure. These proposed rules are required to be published in advance of any meeting at which such rules will be voted upon for approval. Thus, every state will have an equal opportunity for input before a vote is taken, and member states will have ample opportunity to have their position heard and to advocate for passage or defeat of any proposed rules. The compact also allows any interested party, including a state, to challenge a rule promulgated by the compact governing authority within 60 days by filing a lawsuit in federal court. In addition, a majority of legislatures may veto any compact rule or regulation that they find objectionable. Finally, a state may withdraw from the compact by enacting a statute specifically repealing the statute that enacted the compact into law in that state.

10. *Under what circumstances may litigation be used against a member state of the compact to enforce compliance?*

Judicial enforcement through legal action against a noncompliant state is authorized only after a majority vote of the interstate commission. Injunctive relief may be sought, as well as damages, including the award of litigation costs and expenses (including attorney fees) for the prevailing party.

11. *Under what circumstances may suit be brought against the Interstate Commission, that is, the collective members of the compact?*

Under the provisions of the draft compact, in general, the only legal action contemplated against the Interstate Commission is an action filed by a member state for judicial review of a rule promulgated by the Commission based on a “substantial evidence” standard. Such an action is required to be brought no later than sixty (60) days after the rule in question was promulgated.

12. *Can individuals bring suit against the member states of the Interstate Commission if they feel they have been aggrieved by the compact or the administration of the compact in a particular state?*

In general, interstate compacts do not create any privately assertable rights. In *Kansas v. Colorado*, 533 U.S. 1,7 (2001) the U.S. Supreme Court considered the limitations on actions to recover damages from states and held that the Eleventh Amendment bars direct action by citizens against a state. This same principle was earlier applied with respect to litigation involving interstate compacts (see *Texas v. New Mexico*, 482 U.S. 124, 130 (1987)). It appears that standing to sue under an interstate compact, which has congressional consent, is subject to the same considerations applicable to plaintiffs who challenge actions under any other federal statute. See *Bootery Inc. v. Washington Metro Area Transit Authority*, 326 F. Supp. 794, 798-99 (D.D.C. 1971), also *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Utilizing these standards, the determination of whether individuals have standing to sue under a compact will turn on the extent to which such parties can conclusively demonstrate that the actions of the member states of the Interstate Commission have directly impinged upon some protected interest and that they have or will suffer injury as a direct result of such action by the member states of the Interstate Commission. The compact, however, in no way diminishes a child or an affected party’s rights in an individual case to raise substantive issues regarding placement decisions in the appropriate state court.

13. *Why is it necessary to have a provision for state advisory councils as provided in Article VII,G?*

State advisory councils are required under Article VII of the Compact and are created to address the following significant problems: (1) In many states there is scant awareness that interstate issues related to placements of children are a significant public concern until a horrific incident occurs such as the injury or death of a child, the new compact will raise the visibility of the ICPC and create greater awareness of its significance both within the government and among members of the public; (2) Because of the wide array of agencies and officials who may be involved in the process, an ongoing awareness and coordination of interstate placement is necessary; (3) Interstate placement of children is a public policy concern of such significance that it merits a working knowledge on the part of a state coordinating body, however, the precise role and membership of each state council and whether it is newly created advisory body or an existing one is left to the discretion of each member state.