Interstate Commission on Educational Opportunity for Military Children

Briefing for

MIC 3 Executive Committee

July 21, 2010

Proposed

Compact Legal Training Presentation
Interstate Compacts are rooted in the colonial past. Because each colony was independent, disputes between them were worked out by negotiation that was submitted to the king for approval.

Thus interstate compacts are not new. What has changed in the last century is the use of interstate compacts to create on-going administrative agencies.
Legal Foundation
The Compact Mechanism

• A simple, versatile and proven tool
• Principal advantage: provides states with an effective, enforceable means of cooperatively addressing common problems – even though their own laws may differ – without relinquishing authority to the federal government
Interstate Compacts

• Agreements between states authorized under Article I, Section 10, Clause 3 of the U.S. Constitution – the “Compact Clause”

• “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . “

• The U.S. Supreme Court has consistently held that Congressional consent is only required for compacts that tend to increase the political power of the states in a manner that encroaches upon or interferes with the just supremacy of the United States. [U.S. Steel Corp. v. Multi-state Tax Commission, 434 U.S. 452 (1978)]
Uses of Interstate Compacts

• Long history of compacts pre-dates the Constitution
• Flexibility evident in variety of forms and uses:
  ▪ Scope: bi-state, regional, national
  ▪ Creation: negotiated
  ▪ Purpose: fixed agreements, advisory boards, regulatory entities
  ▪ Issues: transportation, environment, taxation, education, health, emergency management, corrections and public safety
Uses of Compacts cont.

- Many well known compacts:
  - NY-NJ Port Auth. Compact of 1921
  - Colorado River Compact (1929)
  - Interstate Compact on the Placement of Children (1960)
  - Washington Metropolitan Transit Authority Compact (1966)

- Increasingly common, broader in scope, more frequent use for regulatory purposes.
Compacts

- Approximately 200 compacts formed since the founding of the U.S.
  - About 38 are inactive
  - On average, each state is a member of 23 compacts

- Creation of the Port Authority of New York and New Jersey in 1921 signaled a new era in regulatory compacts.
3 Primary Purposes

- Resolve boundary disputes;
- Institutionalize and manage interstate issues pertaining to allocation of natural resources;

Create on-going administrative agencies that have jurisdiction over a wide variety of concerns:

- State transportation
- Taxation
- Environmental matters
- Regulation
- Education
- Corrections
- Public safety
Common Law Contract Principles

• An offer to enter the agreement is expressed by statutory language enacted by the first state to join the compact and each subsequent jurisdiction accepts this offer by enacting statutory language, which is substantially similar to that enacted by the offering jurisdiction;

• Once enacted by two or more states, a compact, like any other contractual agreement, is protected from impairment by the states under Article I, Section 10, Clause 1 of the U.S. Constitution;

• Although a state cannot be bound by a compact to which it has not consented, once enacted a compact takes precedence over conflicting statutes of the state;

• A state cannot unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide.
Congressional Consent Requirement

Art. I, Sec. 10, Clause 3 (Compact Clause) prohibits states from entering into compacts without the consent of Congress.

- Originally applied to all compacts – now only to those that:
  - alter the political balance within the federal system; or
  - affect a power delegated to the federal government

  -- *Virginia v. Tennessee*, 148 U.S. 503 (1893)

May be express or implied; may be given before or after the compact is created.
Implications of Congressional Consent


- Relevant for jurisdictional and interpretative purposes, but also gives compact the weight of substantive federal law.

- Compacts enforceable under the Supremacy Clause and the Contract Clause.

- But they remain subject to control of party states, who may amend or repeal them.
Absence of Consent

- Where not required, the absence of consent does not mean a compact is unenforceable – it remains a contract between the states.
- It does mean that the agreement is interpreted as state and not federal law, but is protected from impairment under the Contract Clause of the Constitution (Art. I, Sec. 10, Clause 1).
- Enforcement is ultimately achieved in the Supreme Court under its original jurisdiction.
A state legislature’s ability to delegate regulatory authority to an administrative agency is “one of the axioms of modern government”

-- Justice Felix Frankfurter

Extends to the creation of interstate commissions by compact

-- West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951)
Interstate Compact for Educational Opportunity for Military Children

- So far, 34 States Adopted: AL, AK, AZ, CA, CO, CT, DE, FL, HI, IN, IA, IL, KS, KY, LA, ME, MD, MI, MS, MO, NV, NJ, NM, NC, OH, OK, RI, SC, SD, TN, TX, UT, VA, WA
- Bills pending in NY, PA
- Establishes a national governing body
- Rule making authority which has effect of law
Contextual Elements

• It’s About ‘Sending’ and ‘Receiving’ States
• Compact is “Basic in scope and intent, compelling rules and rulemaking process to be dynamic”
• Compact seeks “reasonable accommodation” of transitioning students of active duty military members
Substantive Compact Requirements

• Applicability:
  – Active duty members (includes activated Guard and Reserves)
  – Severely injured members and veterans (for 1 year)
  – Members who die on active duty (for 1 year)
Substantive Compact Requirements

• Compact includes specific rules to facilitate:
  I. Enrollment
    • Transfer of records – expedite proper enrollment and placement, 10 days to provide official record to receiving school
    • Immunization requirements - up to 30 days to get shots
    • Age of Enrollment – if enrolled age 4, 5, 6 in another state, then move here, allow them to continue
II. Eligibility

• Non-custodial parents - Allow child in care of non-custodial parents in another jurisdiction to continue in same school

• Extracurricular activities - Facilitate ‘opportunity for inclusion’

• Tuition - prohibit LEA from charging tuition to child in care of non-custodial parent living in another jurisdiction

• Power of Attorney Rights - Allow special POA for child of military family for purposes of enrollment and other actions of parent participation/consent
III. Placement

- Course placement – When transfer during school year, receiving school honor placement in courses of sending school, i.e., Honors, AP, IB, vocational, etc.
- Placement flexibility – LEAs get waiver course or program prerequisite flexibility in their jurisdiction
- Absence related to Deployment – Prior to, or returning from a combat zone, superintendent grant additional absences to visit with parent
- Special Education – IDEA, provide comparable services on current IEP; 504 or Title II, equal access
Substantive Compact Requirements

IV. Graduation

- Waive similar coursework completed in sending state, or provide alternate means to graduate on time
- Exit Exams - Accept: Exit or end of course exams from sending state, or National norm referenced achievement tests, or Alternative testing
- Transfers during Senior Year – If not possible for Transferred Sr. to graduate in receiving state, diploma from sending state if student grad requirements are met
Compact Administration

• Once Adopted, states internally:
  – Establish Councils for internal coordination
  – Appoint Military Family Education Liaison
  – Appoint Commissioner to represent the State
  – Assist in funding administrative functions of the Commission

• Adopting States as part of Interstate Commission:
  – Jointly established an Interstate Commission composed of voting representatives from each member State to:
    • Draft and vote on rules
    • Provide oversight, education, guidance and enforcement
    • Resolve disputes
    • Establish funding formulas for member-state assessments
National Structure

- National Commission
- Executive Committee
- Finance Committee
- Rules Committee
- Training & PR Committee
- Other Committees as needed
State Structure

- Provide mechanism for empowerment of Compact process;
- Assist in developing Compact policy;
- Determine qualifications for membership on Council;
- Appoint Acting Commissioner when Commissioner is unable to attend.

- State Education Supt.
- Supt. of Dist. w/ high % of military children
- Other Stakeholders deemed appropriate
Rulemaking

• Perhaps the most innovative change in interstate compacts governing offender movement is the rulemaking power of the Commission.

• Rules are binding on the states and all officials of the state; they are not discretionary
Rulemaking Power

• Commission rules must be adopted in a manner that is substantially similar to the process of the Model State Administrative Procedures Act.
• Majority of state legislatures can reject a proposed rule.
Enforcement Power

- Commission has authority to enforce the compact and its rules upon the states by:
  - Require remedial training
  - Require mediation/arbitration of dispute
  - Impose monetary fines on a state
  - Seek relief in federal court, most likely by obtaining an injunction to curtail state action or compel compliance
Fiscal Note Estimates

- With 630,000 mil children, Current estimates approximately $630,000 for commission assuming 50 member states
- Member States are increasing over time
- Fully Operational with 50 state members by 2012
Liability
Status of Public Employees

• In the public employment context, the issue of immunity and liability are controlled by the types of acts undertaken.

• Most public employees think they are immune from suit by the ancient principle of sovereign immunity. They are not.

• Depending upon the state, sovereign immunity may have only limited application and offer only limited protection.
Types of Public Acts

Generally two categories:

- **Discretionary**: acts in which the public employee has the freedom to exercise good judgment and care in carrying out an act. These acts are not mandatory in the sense of imposing an affirmative duty.

- **Ministerial**: acts that a public employee is required by law to fulfill. Most often these acts are defined by “shall”; they impose a mandatory duty without regard to discretion.
Liability

- Generally, public employees are immune from suit for discretionary acts. The failure to exercise discretion as a plaintiff might desire IS NOT grounds for liability. For example, the decision to parole someone is usually a discretionary act. However, the conduct must not violate the principle of “reasonableness” and clearly established statutory or constitutional rights.

- Generally, public employees are not immune from suit for failing to fulfill a ministerial act and may be personally liable. For example, a probation plan that mandates a minimum of five meetings a month imposes a ministerial duty.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
No Private Right of Action is Created by the Compact

• Unless the statute ‘unambiguously confers’ a clear individual statutory right no violation of 42 U.S.C. Sec. 1983 exists

[See Gonzaga University v. Doe, 503 U.S. 273 (2002); also, Doe v. Pennsylvania Bd. of Prob. & Parole, 513 F.3d 95 (2008)(applicable to interstate compacts)]
Immunity for Commissioners, Employees or Agents

• Activities of the Commission are a ‘State Function’
• 11th Amt. immunity available to administrative agencies, including compact commissions if “good reason to believe” member states intended and so structured the new agency.

Immunity for Commissioners, Employees, or agents cont.

• Article XI, Sec. D.1. of the Compact provides that any liability of the employees or agents of the interstate commission within each state “may not exceed the limits of liability set forth under the Constitution and laws of that state for state officials, employees, and agents.”
Questions?

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Questions