

**HB**

**50**

# ALASKA STATE HOUSE OF REPRESENTATIVES



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Session

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State Capitol  
Room 204

## REPRESENTATIVE JOHN COGHILL

### MEMORANDUM

Date: September 14, 2007  
To: Representative John Coghill  
From: Rynnieva Moss, Legislative Aide *R. Moss*  
Re: Interstate Compact for the Placement of Children

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Everyone agrees the existing compact doesn't work. However, sixteen states have expressed concerns about the power of the Interstate Commission being given the authority to promulgate rules and regulations that would supersede state law.

The areas of the compact that are being questioned are as follows:

1. **Article VI (B)** – a state has **no due process** when it disagrees with the placement authority of the Interstate Commission.
2. **Article IX (A), (C), & (D)** – allows the Interstate Commission to promulgate, interpret, and enforce rules that **supersede** "state law, rules or regulation".
3. **Article XI (A), (D), & (H)** – Gives the Interstate Commission authority to promulgate rules that have the "force and effect of statutory law and shall supersede any state law, rule or regulation to the extent of any conflict". If adopted by a state, this provision relinquishes the sovereignty of state law.
4. **Article XII (A)(2)** – Gives the compact sovereignty over the states adopted the compact.
5. **Article XII (C)(c)** – Gives the Interstate Commission authority to bring legal action against any state adopting the compact.

6. **Article XIII (B)** – Gives the Interstate Commission authority to assess fees on states and allows the commission to promulgate rules to bind the states to the fees. The Alaska State Legislature has appropriation powers and this clause would, in effect, waive that authority.

It should be noted that the Attorney General's Office has advised OCS Director Tammy Sandoval and Health & Social Services Commissioner Karleen Jackson not to agree to the Compact in its current form.

I have attached HB 50 and highlighted the sections with concerns. Also attached is the legal opinion I received from Jean Mischel yesterday.

# LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

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## MEMORANDUM

September 11, 2007

**SUBJECT:** Issues Regarding the Proposed Interstate Compact for the Placement of Children (HB 50; Work Order No. 25-LS0265A)

**TO:** Representative John Coghill  
Attn: Rynniva Moss

**FROM:** Jean M. Mischel  
Legislative Counsel

You have asked for an opinion regarding any state sovereignty and unlawful delegation issues raised in HB 50 that proposes to adopt an Interstate Compact for the Placement of Children. I am uncertain about the meaning of this question as it relates to state sovereignty since the proposed compact does not enact federal law but instead aims to unify state laws if all states adopt the proposed compact as state law.

With regard to any unlawful delegation issues raised in this bill, there are two areas that may be generally said to delegate or waive legislative powers: (1) the "provisional placement" provisions that call for a temporary waiver of state "standards or requirements" pending parent training; and (2) the delegation of fee, enforcement, and rulemaking authority to an Interstate Commission.

The legislature may delegate its law making function only to the extent that the parameters and standards are clearly described by the legislature. What I have in the past advised during meetings on this bill, in order to avoid inconsistencies that are undesirable to an interstate agreement, is to amend other sections of state law that provide for the Department of Health and Social Services to waive, in specified circumstances, training requirements and other standards for foster and adoptive parents, and to review and adopt rules adopted by the Interstate Commission that are otherwise consistent with state laws. I am unable to say with any certainty whether the proposed fee structure to support the Interstate Commission will work since such fees will likely become part of the department's annual budget, subject to legislative appropriation.

If I may be of further assistance, please advise.

JMM:ljw  
07-331.ljw

REPRESENTATIVE  
JOHN COGHILL  
HOUSE RULES  
COMMITTEE CHAIRMAN

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# Alaska State Legislature



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## House of Representatives

March 6, 2007

Steve Dale, Commissioner  
Department for Child and Family Services  
103 S Main Street  
Waterbury VT 05671-9800

Dear Mr. Dale:

I introduced HB 50 in the Alaska Legislature after hearing the need at a CSG meeting for a new Interstate Compact. However, we have not scheduled the bill for committee at this time due concerns we have with the current revised ICPC.

We have met with our local ICPC administrator as well as other groups concerned with the revised ICPC and have come to the conclusion that specific items need to be addressed before we can proceed with the bill. These problems include:

- Art. XII (A)(2); Art. XII (C)(c): Enforcement issues
- Art. XIII (B): Program cost
- Art. VI. (B); Art. XI (D): Potential conflicts with state sovereignty
- Art. IX. (A) (C) (D); Art. XI (A) (D) (H): Formulation of regulations

We are strongly supportive of working with the ICPC and other states to improve the process of adopting and placing foster children in order to ensure a safe and timely procedure. This requires a process that is open and responsive. To this end we would like to have the opportunity to view the feedback that the drafters received from the various states about the concerns they had with the draft as well as suggestions for improvement.


We would like to work with the commission and compact coordinators of CSG to come up with proposals to current problems that we have with the new ICPC and we look

forward to the opportunity to do this. We want an ICPC that we can fully support and will work for passage in our state legislature. However, we are just as strongly committed to block the passage of the ICPC in its current form.

The need for fixing problems that exist with the current ICPC is real and urgent and we support this effort. We look forward to hearing from you and would appreciate your comments and recommendations regarding the issues aforementioned.

Thank you for your work on the new ICPC.

Sincerely,

  
Representative John Coghill  
Rules Chairman

cc:

Leslie McGee  
Dr. Bruce Goldberg  
Howard Hendrick  
Carmen Hooker Odom  
Chris Peterson  
Lewis H. Spence  
Brenda Harvey  
Kevin Concannon  
Jim Robertson  
John Mountjoy

## HB 50 Interstate Compact for the Placement of Children

### Sectional Analysis for Version "C" HESS Committee Substitute

**Section 1.** Amendment language for title change of Compact.

**Sec. 2.** Repeals and reenacts Interstate Compact for the Placement of Children

Article I. PURPOSE. Provide uniform data collection; administrative rules implementing and regulating child placement in member states; provide coordination with other compacts affecting the placement of children; providing continuing jurisdiction and responsibility as if intrastate placement; promulgation of guidelines of Indian tribes; provide procedures to insure safe and suitable placement for children.

Article II. DEFINITIONS. New definitions for approved placement, assessment, child, certification, default, home study, Indian tribe, Interstate Commission for the Placement of Children, Jurisdiction, legal risk, member state, non-custodial parent, non-member state, notice of residential placement, placement, private child-placing agency, private child-placing agency, provisional placement, public child-placing agency, receiving state, relative, residential facility, rule, sending state, service member's permanent duty station, service member's state of legal residence, state, state court, and supervision.

Article III. APPLICABILITY. Interstate placement of a child in state custody as a child in need of aid or a child adjudicated delinquent or unmanageable based on the sending state; interstate placement of a child by a public child placement agency or private child placing agency as a preliminary step to a possible adoption.

Does not apply to a child in a custody proceeding in which a public child placing agency is not a party; interstate placement by one relative to another relative; placement of a non-state custody child in a residential facility by a parent; placement of a child with non-custodial parent under certain circumstances.

Article IV. JURISDICTION. The sending state retains jurisdiction over child, including power to order return of child; receiving state court shall confer with sending state court to determine forum for adjudication; sending state can terminate its jurisdiction under certain circumstances and is required to notify receiving state of that action; allows receiving state jurisdiction sufficient to deal with truancy, delinquency, crime or behavior involving a child violating receiving state laws; permits receiving state to take emergency jurisdiction for the protection of a child.

Article V. PLACEMENT EVALUATION. Sets out in the compact a process for the sending state requesting an assessment from the receiving state on placement,

provide evidence the placement is legal, certification that consent or relinquishment is in compliance, and obtain approval of public child placement agency in the receiving state. Allows the Commission to develop uniform standards for the assessment of the safety and suitability of interstates placements. A final decree of adoption cannot happen until the placement is authorized as an "approved placement" by the public child placing agency in the receiving state.

Article VI. PLACEMENT AUTHORITY. Placement cannot be made until approval is obtained from receiving state or until administrative reversal of a denial of placement.

Article VII. PLACING AGENCY RESPONSIBILITY.

- A. Sending state has financial responsibility for ongoing support and maintenance of child, including those services beyond the public services available in the receiving state. Receiving state's financial responsibility is for any assessment conducted and supervision conducted by the receiving state at the level necessary to support placement.
- B. Private child placement agencies shall be legally and financially responsible for the child as provided by law in the sending state until adoption is final and legally financial absent a contractual agreement to the contrary.
- C. Receiving state assessment shall be done in a timely manner.
- D. Public child placement agency will provide supervision and services for the child including timely reports to the sending state.
- E. Receiving state agency provides supervision and services for the child, including timely reports during the period placement.
- F. Compact does not limit receiving state from contracting for assessments, supervision or services for the child.
- G. Member states shall provide coordination among its branches of government by forming an advisory council or use of existing board.
- H. Requires each member state to have a central state compact office.
- I. Public child placement agency will oversee ICWA compliance.
- J. With consent of Interstate Commission, states may enter into limited agreements that facilitate the timely assessment and provision of services and supervision of placements under this compact. (Does this conflict with E?)

Article VIII. INTERSTATE COMMISSION FOR THE PLACEMENT OF CHILDREN.

Establishes the commission to be a joint commission of member states that shall have responsibilities, powers and duties set forth in HB 50 and additional powers as conferred by concurrent action of respective legislatures of the member states. Each member state will have a commissioner appointed by the HSS Commissioner and this member shall have legal authority to vote on policy related matters by the compact which binds the state. A majority constitutes a quorum and a member can delegate to another person from his or her state but cannot proxy their vote to another member of the commission.

The commission can appoint ex officio members who are from interested organizations and an executive committee shall be established to administer the day-to-day activities of the commission, which do not include rulemaking.

Article IX. POWERS AND DUTIES OF THE INTERSTATE COMMISSION.

- (A) Promulgate rules and take all necessary actions to effect the goals, purposes, and obligations enumerated in the compact.
- (B) Provide dispute resolution to member states.
- (C) Issue advisory opinions concerning interpretation of compact, bylaws, rules or actions.
- (D) Enforce compliance with compact.
- (E) Determine needs for collection of data and collect that data.
- (F) Establish and maintain offices.
- (G) Purchase and maintain insurance and bonds,
- (H) Hire or contract for services of personnel or contracts.
- (I) Establish and appoint committees and officers, including the executive committee.
- (J) Accept funds.
- (K) Lease, purchase, accept contributions or donations of real, personal, or mixed properties.

- (L) Sell, convey, mortgage, pledge, lease, exchange, abandon or dispose of real or personal property.
- (M) Establish budget and make expenditures.
- (N) Adopt a seal and bylaws.
- (O) Establishes annual reporting requirements to legislatures, governors, judiciary and state advisory councils.
- (P) Coordinate public awareness of the commission and its purpose.
- (Q) Maintenance of books and records.
- (R) Perform functions necessary to achieve purposes of this compact.

Article X. ORGANIZATION AND OPERATION OF THE INTERSTATE COMMISSION.

Requirement to set up by laws within one year of first commission meeting and make all records public unless records would adversely affect the personal privacy rights or proprietary interests.

The Commission must meet at least once a year and have proper public notice. A public meeting could be closed by a two-thirds vote if discussion would include personnel issues; information privileged, proprietary or confidential in nature; accusation or a crime or censuring a person; investigative records; matters exempted by federal law; civil or legal proceedings; Meetings may be held by telecommunications or other electronic communication.

The Commission may appoint, through its executive committee, a non-voting staff director as secretary to the commission. It may also elect a chairperson and vice chairperson from among the commission members.

The commission's staff director and employees are immune from suit and liability unless the liability was caused by a criminal act or intentional or willful and wanton misconduct of such person.

Article XI. RULEMAKING FUNCTIONS OF THE INTERSTATE COMMISSION.

Commission shall promulgate and publish rule that substantially conform to the principles of "Model State Administrative Procedures Act", 1981, Uniform Laws Annotated, Vol. 15, p.1 (2000) or other acts commission deems appropriate. Rules promulgated by the Interstate Commission shall have the force and effect of administrative rules.

Allows for an interested person to challenge a rule in the U.S District Court for the District of Columbia within 60 days of the rule being enacted. A majority of members may reject a rule. The new rules shall be enacted and the existing rules voided. Emergency rules can be adopted by a majority vote of the commission.

#### Article XII. OVERSIGHT, DISPUTE RESOLUTION, ENFORCEMENT.

The commission shall oversee the administration and operation of the compact and make sure the three branches of state government enforce the compact. The compact and its rules will be binding on compact states as administrative rules.

Requires state courts to take judicial notice of the compact and rules in any judicial or administrative proceedings. If there is a judicial challenge of a rule as provided for in Article XI, the Commission is entitled to receive service of process.

The commission shall adopt rules providing for mediation and binding dispute resolution and the cost of such actions will be the responsibility of the parties to the dispute. This would apply to disputing member states and member non-member disputes.

If the Commission determines a member has defaulted it may provide remedial training and specific TA or provide written notice of default and the means of curing the default. By a majority vote, the Commission can initiate legal action against the member state in the U.S. District Court for the District of Columbia or a federal district court where the Commission has its principal office. The relief sought may be both injunctive relief and damages.

Rule 24, Alaska Rules of Civil Procedure is amended by entitling the Commission to have standing to intervene in a judicial proceeding in a state pertains to the Compact and in which the validity of a compact provision or rule is an issue for which judicial determination has been sought.

#### Article XIII. FINANCING OF THE COMMISSION.

The Commission can levy on and collect an annual assessment from each member state to cover cost of operations. The Commission shall determine what formula to use and shall promulgate a rule binding upon all member states.

The Commission cannot incur any obligations prior to securing funding and shall not pledge credit of any member state without prior to being given authority to do so by that member state.

The Commission shall keep accurate books and have an annual audit by a certified or licensed public accountant.

Article XIV. MEMBER STATES, EFFECTIVE DATE AND AMENDMENT.

Any state is eligible to become a member of the Commission and Compact will become effective upon legislative enactment by thirty-five (35) states. Non-member states can participate on a non-voting basis.

No proposed amendments to the Compact may be enacted without unanimous consent of the member states.

Article XV. WITHDRAWAL AND DISSOLUTION.

Member states may withdraw from the compact by repealing the statute that adopted the compact and the effective date of the repeal will be the effective date of withdrawal. The withdrawing state shall be responsible for all assessments, obligations, and liabilities incurred through the effective date of the withdrawal. Reinstatement is accomplished by readopting the compact.

Dissolution of the compact occurs when only one state remains in the compact.

Article XVI. SEVERABILITY AND CONSTRUCTION.

The provision of the Compact are severable. If one or more provisions in the compact are found to be unenforceable, the remaining provisions are enforceable.

Article XVII. BINDING EFFECT OF COMPACT AND OTHER LAWS.

A. Other Laws

Nothing herein prevents the enforcement of any other law of a member state that is not inconsistent with this compact.

(B) Binding Effect of the Compact

All lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the Interstate Commission, are binding upon the member states.

If any provision of the compact exceeds constitutional limits of a member state, that provision will be ineffective to the extent of the constitutional conflict.

Article XVIII. INDIAN TRIBES.

The Commission may promulgate guidelines to permit Indian Tribes to utilize the compact and make reasonable effort to consult with Indian tribes in promulgating guidelines.

**Sec. 3.** Conforming language for financial responsibility section of the Compact.

**Sec. 4.** Conforming language for entering into agreements with appropriate officers or agencies.

**Sec. 5.** Conforming language for delegation by agreement for visitation, inspection, or supervision of children, homes, institutions, or other agencies in another party state.

**Sec. 6.** Redefines executive head from the governor to the commissioner of health and social services and provides for establishing a central compact office.

**Sec. 7.** Language conformance on short title of Compact.

**Sec. 8.** The following statutes are repealed:

**AS 47.70.030. Designation of authority.** The term appropriate public authority is no longer used in this title as the compact is now administered by the member states' member of the commission.

**AS 47.70.070. Violations of the compact.** The Commission will now determine the violations and the enforcement of the compact, so this section is no longer needed.

**Sec. 9.** Court Rule change to provide the Commission with notice when a judicial proceeding has been filed relating to the validity of a compact rule or provision is an amendment to Rule 4, Alaska Rules of Civil Procedure.

Rule 24, Alaska Rules of Civil Procedure is amended by entitling the Commission to have standing to intervene in a judicial proceeding in a state pertains to the Compact and in which the validity of a compact provision or rule is an issue for which judicial determination has been sought.

**Sec. 10.** Those sections of Art. XII(4) become effective only if Section 9 amending court rules is approved by a two-thirds majority vote of each house.

**Sec. 11.** Effect of Act occurs when 34 other states have ratified the Compact. The Department shall notify the lieutenant governor and the revisor of statutes when this occurs.

**Sec. 12.** The effective date of sections 1 through 10 is one day after the Health and Social Services notifies the revisor of statutes that 34 other states have ratified the Compact.



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January 14, 2008

**VIA EMAIL ATTACHMENT**

Carla Fults, Project Manager  
American Public Human Services Association (APHSA)  
810 First Street, N.E., Suite 500  
Washington, DC 20002

Dear Ms. Fults:

On behalf of the American Academy of Adoption Attorneys (AAAA), it is my pleasure to inform you that the January 7, 2008, draft of the new Interstate Compact for the Placement of Children (ICPC) that you provided to us has been approved by AAAA Board of Trustees.

In a message to all the Fellows of the Academy sent today, I announced the official position of the Academy to recommend passage of this version by the states.

Please let me know if you need anything further at this time regarding AAAA's support of The New Compact.

Very truly yours,

Herbert A. Brail, President

HAB/cr

# APHSA

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American Public Human Services Association

TO: Commissioners, Child Welfare Directors, Compact Administrators,  
Deputy Compact Administrators and ICPC Staff

FROM: Carla Fults,  
Project Manager

DATE: January 25, 2008

SUBJECT: Endorsement and Revisions of the New ICPC of the New Interstate  
Compact *for* Placement of Children. (ICPC)

It is with great pleasure that I inform you that the **American Academy of Adoption Attorneys (AAAA or Quad A)** has agreed to full approval and support of the attached version of the **New Interstate Compact *for* the Placement of Children (ICPC or New ICPC)**. After careful negotiation with the American Academy of Adoption Attorneys, we have successfully negotiated new provisions which address the concerns raised by various private and independent adoption groups throughout the country. The attached document is a result of contributions from state compact administrators, state legal counsels, stakeholders and child and family welfare judges. **The Executive Committee of the National Council of State Human Services (APHSA Policy Council)** has endorsed the attached revised version of the **New Interstate Compact *for* the Placement of Children (ICPC)** for introduction to state legislatures. In addition, the executive committees of the **National Association of Public Child Welfare Administrators (NAPCWA)** and the **Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC)** have endorsed the attached version of the **New ICPC**.

You may recall, between June, 2006 and July, 2007, approximately fifteen (15) states introduced the Proposed New Compact. However, only Ohio, Missouri and Maine were successful in passing the legislation. Private and independent adoption agencies launched an effective campaign to oppose the Proposed New ICPC, asserting that the draft did not adequately address many of the problems and barriers existing under the current ICPC. Such barriers included excessive wait times for ICPC processing before prospective adoptive parents could travel or return to their home state with a child; arbitrary requests and requirements which were not an important or necessary part of the ICPC process; and conflict of laws and unclear processes where two or more states were involved in an interstate adoption. In addition, the group argued that the Proposed New Compact needed to clarify the definition and application of an assessment compared to a home study and whether these terms would represent and require a separate and

additional review when placing a child; to include language that would provide for a choice of law in the state where an adoption is finalized; and lastly, to amend language which indicated that the rules promulgated by the interstate commission would "supersede state law". State legislatures also expressed opposition to language which stipulated that the rules would "supersede state law".

The New Compact now provides for a choice of law (**Article IV**) in the state where the adoption will be finalized; clarifies the definition of assessment and home study and the application of each term (**Article II**); provides for provisional travel for prospective adoptive parents, contingent upon submission, receipt and review of required documents to verify and ensure safety (**Article V**); and clarifies that rules promulgated by the interstate commission shall have the force and effect of administrative rules (**Article XI**). A list of the revised articles is included below. In addition, please find attached the New Compact with revisions in red, the endorsement letter from the American Academy of Adoption Attorneys, a clean copy of the New Compact which does not highlight changes and may be used as enabling legislation when introducing the New ICPC in your state legislature, and the email cover memo in Word format (document).

**APHSA will hold an all-state call for questions and answers (Q&A) on Thursday, January 31, 2008 at 3 p.m. E.T.** For those states that are planning to introduce the New ICPC before the all-state call and have questions and (or) need assistance, please feel free to contact Carla Fults at (202) 682-0100, ext. 242. APHSA will continue to provide the states with the following services to support enactment of the New ICPC.

- Develop boiler-plate legislative testimony to be used during legislative committee hearings and/or other public events where the primary goal is education on the ICPC. The model testimony will be developed in such a manner as to be customizable for a variety of uses and for a variety of champions and staff.
- Respond to specific questions from the states.
- Convene meetings via teleconference with your attorney general or other state/agency officials to provide clarification of provisions contained within the Compact.
- If necessary, convene an on site briefing with key legislators, legislative staff, executive branch and agency officials and relevant stakeholder groups.
- Provide tailored assistance to individual states at your request.
- Provide expert(s) to testify with you.
- Work with your attorney general or your ICPC staff to include necessary state legislative language which does not alter or change the intent or foundation of the Compact.

On behalf of APHSA, I would like to extend a special thank you to the AAICPC, NAPCWA, and to the many state legal counsels, judicial and interstate administrators and staff who participated in producing this revised version of the New ICPC. If you have questions, please feel free to contact me by email at [cfults@aphsa.org](mailto:cfults@aphsa.org) or at (202) 682-0100, ext. 242. Thank you in advance for your continued support of the New ICPC.

**List of Articles Amended**

- Article II. Definitions (Assessment, Home Study; other definitions were added to support overall changes)
- Article IV. Jurisdiction (Choice of Law)
- Article V. Placement Evaluation (Provisional Travel/Placement)
- Article XI. Rulemaking Functions of the Interstate Commission (Interstate Commission)

Attachments:

- The revised copy of the New ICPC with changes in red – Entitled “ The New Compact with revisions shown 010708”
- Endorsement letter from the American Academy of Adoption Attorneys
- Clean version of the New ICPC to be used for state introduction/enactment - Entitled “The New ICPC 2008”
- Word version of the email cover memo – Cover memo for Endorsement of the New ICPC

# HARTIG RHODES HOGE & LEKISCH, P.C.

ROBERT L. HARTIG (1928-1980)  
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January 24, 2007

JAN 26 2007

Representative Peggy Wilson  
Alaska House of Representatives  
State Capitol, Room 108  
Juneau, AK 99801-1182

Re: HB 50 Interstate Compact on the Placement of Children ("ICPC")

Dear Representative Wilson:

I am the Alaska member of the American Academy of Adoption Attorneys, the national professional association of adoption attorneys. The Academy is strongly opposed to the ICPC amendments proposed in HB 50. Enclosed is a summary of the bill prepared by the Academy and a statement of opposition.

In my experience, the Alaska ICPC has functioned very well performing its role of protecting children placed for interstate adoption without creating excessive delays for adoptive parents and children. Amendments to the Compact must take great care not to inflict more harm than the cure proposed. The Academy does not believe HB 50 possesses this critical test.

We request the opportunity to testify on HB 50 at any hearing that may be scheduled.

Sincerely,

  
Robert B. Flint

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June 7, 2006

Re: Opposition to proposed new Interstate Compact for the Placement of Children

The American Academy of Adoption Attorneys opposes state enactment of the proposed new Interstate Compact for the Placement of Children (ICPC). Interstate adoptions of children, whether from foster care or from private individuals, have been governed for 46 years by a legal compact between the states known as the Interstate Compact on the Placement of Children, which is administered by the American Public Health Services Association (APHSA). Two years ago, in an attempt to address the changing nature of adoption in America, APHSA invited stakeholders (including the Academy) to be part of a process to rewrite and update the compact. Unfortunately, the resulting document, which must be enacted by 35 states in order to go into effect, betrays the interests of the very children, birth parents, and prospective adoptive parents it is supposed to protect and support.

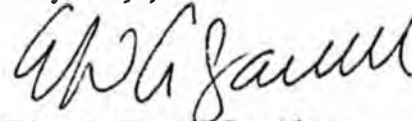
The American Academy of Adoption Attorneys is a non-profit association of attorneys, judges, and law school professors who practice, or have otherwise distinguished themselves, in the field of adoption law. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to ensure appropriate consideration of the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. Members of the Academy represent adoptive parents, birth parents, adoption agencies and others involved in adoptions and they must maintain their practice according to the highest standards of professionalism, competence, and ethics. And, they must be exceptionally well qualified and experienced in interstate adoptions in order to become members of the Academy.

The members of the Academy strongly believe that the proposed new ICPC would add uncertainty, bureaucracy, delay, and cost to interstate adoptions rather than correct these barriers to cross jurisdictional placements. Principle among the reasons it would do so are:

1. It creates an interstate adoption commission of unelected bureaucrats with the power to make interstate adoption law, overriding state law, and leaves for the latter deliberations of the commission many critical policy decisions.
2. The funds to operate the commission would come from mandatory levies upon the member states and from prospective adoptive parents.
3. It inserts state child welfare agencies into the assessment of the suitability of private, independent adoptions, in addition to foster care adoptions. Private adoptions now are highly regulated by statutes to minimize the need for government involvement.
4. It establishes a chaotic interstate legal environment by leaving unclear which state laws will apply in particular kinds of cross jurisdictional placements or adoptions.

The Academy urges all governors and state legislatures to reject the proposed new compact and to send it back to APHSA for revisions. Any new compact must clearly, concisely, and unambiguously insure that the best interests of children are its first priority and mission. Members of the Academy are anxious to work within the framework of such a compact. For more information contact me or any Academy member by going to our online directory at [www.adoptionattorneys.org](http://www.adoptionattorneys.org).

Very truly yours,



Ellen A. Yarrell, President

American Academy of Adoption Attorneys

## **Interstate Compact for the Placement of Children ("ICPC")**

### **Existing ICPC**

- drafted in 1960 and adopted in all 50 states, DC, and US Virgin Islands
- establishes supposedly uniform legal and administrative procedures governing the interstate placement of children
- intended to ensure protection and services to children who are placed across state lines for foster care or adoption and addresses legal and financial responsibility for those involved in interstate placements

### **Proposed New ICPC**

- The American Public Health Services Association ("APHSA") has drafted a new proposed ICPC and has begun to present it to state legislatures.
- While there are good things in the proposed new ICPC, it will have a greater negative impact on children and adoptions than the existing ICPC because of increased delays, bureaucracy, and financial burdens on both states and adoptive families.
- Some of the major problems with the proposed new ICPC are as follows:
  - It creates a national adoption super-legislature called the "Interstate Commission" made up of appointed commissioners that will have power to override state law. Unlike laws passed by Congress or state legislatures, "rules" adopted by the Interstate Commission are not subject to any checks and balances, such as a veto power. Yet, these "rules" have the "force and effect" of statutory law. The Interstate Commission is required to pay its expenses and would have the authority to levy on and collect an annual assessment from each member state to cover the cost of its operations and activities. The proposed new ICPC leaves far too many unanswered questions to be decided by the Interstate Commission.
  - A "rule" made by the Interstate Commission can only be challenged by "judicial review." The proposed new ICPC is most probably unconstitutional. Lengthy and expensive litigation seems certain.
  - It creates an "assessment" process that is mostly undefined and that likely will make interstate placements slower, more burdensome, and more costly than the current interstate placements. Approval under the proposed new ICPC would require the completion of this undefined, individualized "assessment" by the public child placing agency in the receiving state.
  - Under the existing ICPC, approval usually only requires compliance with the laws of the sending or receiving state. Under the proposed new ICPC, approval would require compliance with the laws of the sending state, the receiving state, the birth mother's state of residence, and the laws of the birth father's state of residence. This creates a great potential for conflict of laws problems and, again, more litigation.

### **Recommendation**

The proposed new ICPC would add uncertainty, bureaucracy, delay, and cost to interstate placements, which are already burdened by too much bureaucracy, delay, and cost. The enactment of the proposed new ICPC would result in placements that are less secure and more uncertain, which would not be in the best interest of the children. Therefore, the American Academy of Adoption Attorneys opposes the proposed new ICPC.



**AMERICAN ACADEMY OF  
Adoption Attorneys**

**Proposed New Interstate Compact  
for the Placement of Children**

**MEMORANDUM IN OPPOSITION**

- This document raises key concerns about the proposed Interstate Compact for the Placement of Children ("ICPC") which the American Public Health Services Association ("APHS") has begun to present to all state legislatures in 2006.
- Members of the American Academy of Adoption Attorneys ("AAA")-a non-for-profit organization of about 320 expert adoption lawyers from every state- have voted unanimously to oppose the proposed ICPC.
- While there are good things in the proposed ICPC, it will have a greater negative impact on children and adoptions than the existing ICPC because of increased delays, bureaucracy, and financial burdens on both states and adoptive families.

**What is the existing ICPC?**

- The existing ICPC was drafted in 1960 and has been adopted in all 50 states, DC, and US Virgin Islands.
- It establishes supposedly uniform legal and administrative procedures governing the interstate placement of children
- It is intended to ensure protection and services to children who are placed across state lines for foster care or adoption
- It also addresses legal and financial responsibility for those involved in placements

**Why a replacement ICPC?**

The existing ICPC has come under criticism for various reasons

- It is sometimes applied inconsistently and arbitrarily by the various states' compact administrators
- Placements are not always timely and adoptive parents are sometimes left hanging, possibly for weeks and occasionally a month or more
- Best interests of the child sometimes takes a backseat to other issues

### **APHSA Task Force**

- Because of growing dissatisfaction with the existing ICPC, APHSA convened a task force to rewrite the ICPC
- The APHSA administers the existing ICPC and billed the efforts to rewrite the ICPC as a cooperative effort by the states and other "stakeholders"
- This process has been underway for about three years and has gone through several drafts, resulting in the proposal now being presented to the states
- ///A agreed that something needed to be done to fix the existing ICPC, but ///A cannot support the proposed ICPC for reasons set forth here

### **Private adoptions.**

- This summary focuses on placements by "*private child placing agencies*" as defined in the proposed ICPC
- Much of the criticism about the existing ICPC that spawned the rewriting efforts was directed at how it deals with private agency and independent adoptive placements, and most ///A members deal primarily with these kinds of placements
- Thus, this summary does not discuss residential placements or adoptive placements of children in state custody

### **Proposed ICPC and Private Adoptions**

The proposed ICPC applies to the "interstate placement of any child by a ... private child placing agency ... as a *preliminary step to a possible adoption.*" Article III.A.3.

#### **"Private child placing agency"**

This term is broadly defined as "any private corporation, agency, foundation, institution, or charitable organization, or any private person or attorney that facilitates, causes, or is involved in the placement of a child from one state to another . . ." Article II.M.

#### **"Public child placing agency"**

This is opposed to a "public child placing agency" which is "any governmental child welfare agency or child protection agency or private entity under contract with such an agency, . . . and which facilitates, causes, or is involved in the placement of a child from one state to another." Article II.O.

### **Exceptions to ICPC applicability:**

- Placements with a non-relative not intended to effectuate an adoption. Article III.B.1.
- Placements by one relative directly with another relative. Article III.B.2.
- Inter-country adoptions. Article III.B.5.
- Sending by a private child placing agency for a "visit" as yet to be defined. Article III.B.7.
- U.S. citizen child living overseas with family, where a parent is a member of the U.S. Armed Services stationed overseas, and the child is "removed and placed in a state." Article III.B.6.

### **Problems that make the proposed ICPC worse than the existing ICPC**

- Creates a national adoption super-legislature called the "Interstate Commission" made up of appointed commissioners that will have power to override state law.
- Leaves far too many unanswered questions to be decided by the "Interstate Commission."
- Creates an "assessment" process that is mostly undefined and that likely will make interstate placements slower, more burdensome, and more costly than they currently are, something that is not good for adoptions or for kids.

### **Interstate Commission**

- Comprised of one "commissioner" from each member state appointed by the head of the state human services administration over child welfare. Article VIII.B.
- No statement of qualifications for commissioners, and no guarantee they will be individuals who have ever had any real adoption experience.

### **Why is this bad?**

These people will have power to set national adoption policy and fund their own operations through "rules" that will be binding on all member states, yet they don't have to be adoption experts or have any special attachment to adoption.

### **"Rule"**

A "rule" is "a written directive, mandate, standard or principle issued by the Interstate Commission . . . that is of general applicability and that implements, interprets or prescribes a policy or provision of the compact. 'Rule' has the force and effect of statutory law in a member state, and

includes the amendment, repeal, or suspension of an existing rule." Article II.S.

### **Rules supersede state law**

But, even worse, "[r]ules promulgated by the Interstate Commission . . . shall supersede any state law, rule or regulation to the extent of any conflict." Article XI.D.

### **What are some policies and provisions of the compact?**

- Indian Child Welfare Act ("ICWA") compliance in interstate adoptions
- Definition and determination of "safe" and "suitable" interstate placements
- Standards, procedures, and formats for conducting "assessments" in interstate adoptions
- Compliance with sending state laws and receiving state laws
- Determining which laws must be complied with when taking birth parent consents
- Timeframes for completing "assessments" for interstate adoptions
- Legal and financial responsibility in interstate adoptions

### **Example: The Indian Child Welfare Act**

- The Indian Child Welfare Act ("ICWA") is a federal law governing the placement of Indian children, and is very complex and difficult for even lawyers and judges to understand.
- The proposed ICPC delegates to the "public child placing agency in the sending state" the responsibility to "oversee compliance with the provisions of the [ICWA] for placements subject to the provisions of this compact, prior to placement." Article VII.I.
- As a "policy" or "provision" of the compact, the Interstate Commission would be empowered to fill in the gaps with "rules."
- As a federal law, ICWA should not be a target of this rule-making process.

### **Another example: financing**

- The Interstate Commission is required to pay its expenses, and it "may levy on and collect an annual assessment from each member state to cover the cost of the operations and activities of the Interstate Commission and its staff . . . ." Article XIII.A. and B.
- A budget is required to be approved each year, and assessments from member states are to be collected based on an allocation that is required to be set by "rule," meaning the allocation will be binding as statutory law in each member state. *Id.*

### **Is this rule-making power constitutional? Probably not.**

As a trusted Legal Treatise states:

“... it is a cardinal principle of representative government ... that ... the legislature cannot delegate its power to make laws to any other authority or body... The legislature may not in any degree abdicate its power; . . . and certainly it may not delegate to another the power to enact a law, whether in form or effect.”

*Volume 16A, American Jurisprudence Second, Constitutional Law § 293*

In another section, that Treatise states also:

“... the legislature may not delegate its power to enact, suspend, or repeal laws... The legislature may not delegate such essential elements of its lawmaking power as its power to declare principles and standards, or general public policy.”

*Volume 16A, American Jurisprudence Second, Constitutional Law § 295*

### **Litigation is certain.**

- While provisions of the proposed ICPC that are held unconstitutional in a state are severable and ineffective in that specific state, see Article XVII.B.3., it will take litigation to determine constitutionality in each state.
- Litigation is virtually certain in many member states to have the rule-making power of the Interstate Commission found unconstitutional.
- This is an added cost legislatures and the Interstate Commission must be prepared for.

### **No veto power**

- Unlike laws passed by Congress or state legislatures, “rules” adopted by the Interstate Commission are not subject to any checks and balances, such as a veto power.
- Yet, these “rules” have the “force and effect” of statutory law.
- The only ways a “rule” can be thrown out are by “judicial review,” meaning litigation, in federal court or if the states “reject” a rule, a lengthy process that is likely not feasible.

### **Rejecting rules will not be feasible**

- States may only reject a rule outright if a majority of member states adopt a law to reject the rule. Article XI.F.
- In other words, it could take years to “reject” a rule that is not liked.
- The only real alternatives may be having the rule-making power declared unconstitutional, challenging specific rules in court, **or not adopting the new ICPC at all**

### **The “assessment” process will be lengthy, burdensome, and costly**

- Prior to a child being placed in another state, a private child placing agency must do four things:

**First**, show that the “applicable laws of the sending state have been complied with” Article V.B.1.

But, an “approved placement” is one where the laws of the “receiving state” must be complied with, which is also what the existing ICPC requires. See Article II.A. and Current ICPC Art. III(1).

### **Another new layer of cost . . .**

**Second**, the agency must certify that the “consent or relinquishment is in compliance with applicable law of the birth parent’s state of residence or, where permitted, the laws of the state where the finalization of the adoption will occur” Article V.B.2.

Consents now are typically done according to the laws of the sending or receiving state.

### **This will add new costs to adoptions.**

Suppose the birth mother at her choosing or out of necessity delivers in a state other than her state of residence?

Suppose the birth father lives in yet another state and his consent or relinquishment is required by his state.

Suppose the adoptive family lives in one state, the birth mother from a second state, the birth father in a third state, and the agency the birth mother contacted is in a fourth state.

The baby is born in the agency’s state at the birth mother’s choosing, but you may need to comply with the laws of all four states!

What if the laws of these states are in conflict?

*Under the existing ICPC, while there can be confusion, you don’t have to comply with the laws of four states.*

### **Finally, you can request an assessment.**

**Third**, an agency must request “through the public child placing agency in the sending state an assessment to be conducted in the receiving state.” Article V.B.3.

Under the existing ICPC, no “assessment” is requested or done. Notice of a proposed placement is sent, along with a home study and other documents about the placement. The compact administrator evaluates the placement as to whether it is contrary to the interests of the child based on the submissions. Current ICPC Art. III(2).

### **What is an “assessment”?**

An “assessment” is “an evaluation . . . to determine whether the placement meets the individualized needs of the child, including but not limited to the child’s safety and stability, health and well-being, and mental, emotional and physical development.” Article II.B.

This appears more subjective and open to interpretation and abuse than the “notice” and submission of other documents required under the existing ICPC. See Current ICPC, Article III(2).

### **Rules still have to be issued setting:**

- Standards for conducting “assessments”
- Procedures and forms for making requests for assessments
- Information that will be required to be submitted
- Timeframes for conducting “assessments” Article V.C. and F.
- In other words, we don’t know anything about what these “assessments” will involve. We don’t even know what constitutes a “safe” and “suitable” placement.

### **Public adoptions?**

- The receiving state’s public child placing agency does the “assessment” for a placement by a private child placing agency “to determine its safety and suitability.” Article V.D.
- This is similar to ICPC assessments done currently for the placement of children in public custody, and these currently can take months.
- Adoptive families doing private agency and independent adoptions cannot afford months for an assessment to be done.

## **Complexity coupled with uncertainty counsel against the proposed ICPC**

- The “assessment” process in the proposed ICPC is more complicated than the current notice process under the existing ICPC
- No one knows how the “assessments” will be conducted, what will be required, or how timely they can be done
- While the existing ICPC process is frustrating, the proposed process appears to be much worse and likely will be more lengthy, and place greater burdens and costs on adoptive families

### **We finally get around to “approval”!**

**Fourth**, “[u]pon completion of the assessment, [the agency may] obtain the approval of the public child placing agency in the receiving state.” Article V.B.4.

### **What is an “approved placement”?**

A placement can be approved if “the receiving state has determined after an assessment that the placement is both safe and suitable for the child and is in **compliance** with the applicable laws of the receiving state governing the placement of children therein.” Article II.A.

### **You can’t go home until approved.**

- No child can be placed into a “receiving state” “until approval for such placement is obtained.” Article VI.A.
- Adoptive parents usually take custody of the child in the sending state before submission of ICPC paperwork so that bonding and attachment can begin immediately.
- It is detrimental to the child if the child must be placed in interim foster care for any length of time.
- The adoptive parents will either have to wait through the unknown assessment and approval process in the sending state, or place the child in foster care until approval is received.

### **To get approval you must have:**

- complied with the laws of the sending state
- complied with the laws of the receiving state
- complied with the laws of the birth mother's state of residence for her consent or relinquishment if her state is different
- complied with the laws of the birth father's state of residence for his consent or relinquishment if one is needed from him
- requested through the sending state that the receiving state conduct an assessment
- had that assessment conducted pursuant to currently unknown standards and procedures

This is no small task and could take enormous amounts of money and time away from home. Most of this is new to the proposed ICPC.

### **This is worse than current law.**

- The existing ICPC usually only requires compliance with the laws of the sending or receiving state.
- The lengthy "assessment" process, coupled with what is **not** known about it, is worse than the current "notice" process because we simply don't know what's involved, and we won't know until the Interstate Commission issues its rules.
- Add to this the bureaucracy of the Interstate Commission and its veto-proof power to make "rules" that have the effect of statutory law in all member states, including the power to "levy" and "assess" a fee to fund its operations, and it is easy to see the proposed ICPC is not good for children, families, or the states.

### **What if placement is denied?**

- A person may seek "administrative review" and "any further judicial review" of the decision "in the receiving state pursuant to its applicable administrative procedures." Article VI.C.
- All this while the adoptive parents, who are from the receiving state, wait out the appeals in a hotel room in the sending state, bathing their newborn in a sink.

**Other issues:**  
**Legal and financial responsibility**

- A “private child placing agency,” remains “legally responsible for the child during the period of placement as provided for in the law of the sending state until the finalization of the adoption,” and “[f]inancially responsible for the child absent a contractual agreement to the contrary.” Article VII.B.
- This includes birth mothers and attorneys who do independent placements not involving an actual agency. See the definition of “private child placing agency.” See Article II.M.

**Children and Families Deserve Better**

- *The proposed ICPC will make delays and burdens families face in interstate adoptions worse, not better*
- *The proposed ICPC will make the already high costs of adoptions even higher, further straining the budgets of our families*
- *The proposed ICPC creates an unprecedented powerful bureaucracy—paid for by the states—that will be able to set binding national adoption policy with the force of law in the member states*
- *The APHSA can do better than this and the States need to send that message by rejecting the proposed new ICPC*

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HB 50  
Office of Children Services  
Brief Talking Points (2/21/08 House HESS)

HB 50  
from HESS

Marcia Pickering  
Deputy Compact Administrator  
456-2105

The current compact was written in 1959/60 and enacted by the first state in 1960. Alaska joined in 1976. The compact was written before the US created an interstate highway system, before the concept of Administrative Law, and before the home use of computer technology.

The proposed legislation before you offers an opportunity for states to renew their commitment to the safe and timely interstate placements of children in foster care and more expedient interstate placements for private adoptions.

The new compact is intended to bring:

- Uniformity to the process
- Accountability
- Continued Reciprocity
- and insure Safe and Timely placements

And it has been endorsed by the Executive Committees of the  
Nat. Council of State Human Services  
Nat. Association of Public Child Welfare Administrators  
Nat. Association of Administrators of the ICPC  
American Academy of Adoption Attorneys

## HIGHLIGHTED CHANGES

### PROVIDES FOR:

Administrative Rule making and enforcement

Supervision services and Accountability  
Option of Purchasing Services / HS and Supervision  
Uniform Data Collection and Info Sharing  
Guidelines involving Tribal Governments  
Now 2 Type of Placement Evaluations, uniformity  
Home Study  
Assessment  
Provides for Provisional Approvals, (assessments)  
Specifies Choice of Law regarding interstate issues  
Rule Making /applicability of ICPC to US armed Service

Members

DELETED:

Applicability to private parent placements, with relatives and non-relatives, when the placement will not result in an adoption.

Applicability to private parent placements to a residential program.

Applicability to Foreign Adoptions