MIC3 MILITARY INTERSTATE CHILDREN'S COMPACT COMMISSION	**Number:** **4-2017**
Advisory Opinion **Issued by:** Cherise Imai, Executive Director Richard L Masters, General Counsel	**Dated:** February 27, 2017 **Approved:** May 3, 2017
Requestor: Utah State	
Description: Whether the provisions of the Interstate Compact on Educational Opportunity for Military Children, ("MIC 3") apply to members of the National Guard or Reserve who are not on active duty as defined in Title 10 of the U.S. Code.	

I. Background

Pursuant to Article X, Section C. of the Interstate Compact on Educational Opportunity for Military Children (hereinafter 'Compact') the State of Utah has submitted a request for an advisory opinion concerning clarification of an issue pertaining to the Compact.

II. Issue

The State of Utah has proposed a statute which seeks to expand the application of the Compact statute to members of the National Guard or Reserve who are not on active duty as defined by Title 10 of the U.S. Code. and would like further guidance from the Military Interstate Children's Compact Commission concerning whether the provisions of the Compact are applicable to these families. Assuming the answer to the question is in the negative Utah also seeks guidance as to accommodating such families through other means.

III. Applicable Compact Provisions or Rules

Article III, Section A. 1. of the Compact provides:

"Except as otherwise provided in Section B., this compact shall apply to the children of:

1. *Active duty members of the **uniformed services** as defined in this compact, including members of the National Guard and Reserve on active duty orders pursuant to 10 U.S.C. §1209 and §1211;" (emphasis supplied).*

Article II, Section A. of the Compact states that:

"Active duty" means: *full-time duty status in the active uniformed service of the United States, including members of the National Guard and Reserve on* ***active duty orders pursuant to 10 U.S.C., §1209 and §1211."*** *(emphasis supplied).*

"Active duty" is defined under 10 U.S.C. 101(d)(1) to mean full-time duty in the active military service of the United States, including "full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department *U.S.C., §1209 and §1211." (emphasis supplied*

IV. Review and Analysis

An analysis of the application of a statute begins with examination of its text. Article II, Section A. of the Compact unequivocally defines *'active duty'* as *"full time duty status in the active* ***uniformed service of the United States****, including members of the National Guard and Reserve on active duty orders under 10 U.S.C., §1209 and §1211." (emphasis supplied).*

Moreover, Article III, Section A.1. of the Compact, in equally unambiguous terms, provides that the provisions of the compact are applicable to *"****active duty*** *members of the uniformed services as defined in this compact* ***. . ."*** *(emphasis supplied).*

Article III, Section A. 1. of the MIC 3 statute explicitly states that the compact is applicable to "***children of active duty members of the uniformed services*** *as defined in this compact . . ."*
(emphasis supplied).

The intent of these compact provisions, including the above referenced definitions, can be determined from the plain meaning of the language used that the provisions of MIC 3 are not applicable to children of members of the National Guard or Reserve who are not on active duty as defined by federal law and the compact. This is also consistent with the relevant provisions of the Title 10 U.S.C.§ 101. which provides that the term ***''active duty''*** *means full-time duty in the active military service of the United States, including "full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty." (emphasis supplied).*

As the U.S., Supreme Court has reaffirmed, "Applying 'settled principles of statutory construction,' we must first determine whether the statutory text is plain and unambiguous and . . . [i]f it is, we must apply the statute according to its terms." *Carcieri v. Salazar,* 555 U.S. 379, 387 (2009); See also *Lamie v. U.S. Trustee,* 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." (internal quotation marks omitted).

The proposed Utah legislation amends the Interstate Compact on Educational Opportunity for Military Children to delete the requirement that limits the compacts applicability to children of military parent(s) who are on active duty as defined in Title 10 of the U.S. Code. Based upon the above analysis, this amendment may jeopardize the

State's participation in the current compact and its ability to interact with the other member states in facilitating educational transitions for these students in grades K-12.

The reason for this concern is based upon existing case precedent from the U.S. Supreme Court under which this amendment appears to violate an "axiom" of the law of interstate compacts. The legal problem created is that a member state which has enacted a compact is not free to unilaterally amend it in a manner which creates a **material** deviation or difference from the terms of the agreement entered into by other states.

Because interstate compacts are both statutory and contractual, they are subject to rules of construction applicable to contracts and as such all statutory enactments must be sufficiently similar to show a 'meeting of the minds' (mutuality of obligation) of the parties, which in this case are the member states. *See U.S. Trust Company v. New Jersey, 431 U.S. 1 (1977), See also generally, Caroline N. Broun, Michael L. Buenger, Michael H. McCabe & Richard L. Masters, The Evolving Law and Use of Interstate Compacts, Sec. 2.1.2.5, pp. 48-50 (ABA Publishing, 2016).*

As to the **'materiality'** of a proposed amendment to compact language, this is determined using the traditional contract law analysis as to whether there has been a "meeting of the minds." In other words, Is the agreement among the parties sufficiently similar to show evidence of mutual intent to be bound by it? While, as in most cased of 'contract' analysis in this regard, there is no bright yellow line or completely objective 'test,' there is some useful guidance in the common law.

The case of *Henderson v. Delaware River Joint Toll Bridge Commission et al., 66 A.2d 843, (Pa. 1949)* also provides some perspective as to the degree of difference which is permissible with regard to amending a compact. *Henderson* also relies upon an earlier U.S. Supreme Court decision which provides further guidance. In *Henderson,* the Court held "It is within the competency of a State, which is a party to a compact with another State, to legislate in respect of matters covered by the compact so long as such legislative action is in approbation and not in reprobation of the compact. See *Olin v. Kitzmiller, 259 U.S. 260, 263. Henderson, supra. at pp. 849-850.* When analyzed based upon the above standard, removing the citations to the definition of "active duty" could arguably undermine an intent to benefit the families of active duty military members as distinguished from those not on active duty or even civilian employees.

Based upon the above referenced case law, the Commission is concerned that the alteration of the language of the Compact will create a statutory anomaly which will interfere with the ability of Utah to participate in the Compact, which it is certain is not the intent of the legislation but which may very well be an unintended consequence.

Finally, it must be emphasized that while Article XV, Section C. of the Compact clearly authorizes the Interstate Commission to propose amendments for enactment by the member states. It also provides that ***"No amendment shall become effective and binding on the Interstate Commission and the member states unless and until it is enacted into law by unanimous consent of the member states."*** (emphasis supplied). This fact is equally significant in that the proposed amendment of the Utah statute, even if otherwise legally defensible based upon the above 'compact law' analysis, will only be effective, if at all, within the State of Utah and thus will only benefit eligible families transferring into the State of Utah.

You have also asked for the Commission's guidance and assistance in an alternative manner in which to accomplish the desired accommodations of the school age children of members of the National Guard and Reserve. While the Commission certainly has no objection to this worthy effort on behalf of families of members of the Guard and Reserve, due to the above legal issues, the Commission is requesting that you consider the enactment of legislation outside the terms of the compact by way of a separate statute which has been used in at least two other states (Kentucky and California) to date. Information is available from the Commission which is pleased to assist in gathering the necessary materials to facilitate your efforts in this regard.

V. Conclusion

In sum, by its explicit terms the provisions of the Compact are not applicable to children of a member of the national guard or reserve who is not on active duty as defined by **Title 10** of the U.S. Code. (*See Compact Art. II, Section A and Art. III, Section A. 1.*). Moreover, the amendment to the MIC 3 Compact statute could create a legal anomaly which might jeopardize the participation of Utah or any other state which enacts a substantive, unilateral amendment to the Compact. For that reason, enactment of a statute providing for such an accommodation is not permitted.