

# MEMORANDUM

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To: Military Interstate Children's Compact Commission (MIC3)

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Re: Application of Military Interstate Children's Compact to NGR Members

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I. Introduction

This memo was drafted to address the strategic implications of various options for creating an amendment to the Military Interstate Children's Compact (the "Compact") which would allow for the provisions of the Compact to apply to the children of National Guard and Reserve ("NGR") members. Six options for accomplishing this change are reviewed herein.

II. Question Presented and Short Answer

Question: What is the best way to amend or change the Military Interstate Children's Compact to include National Guard and Reserve members?

Short Answer: Standalone state legislation providing identical benefits to National Guard and Reserve members as those provided under the Compact is likely to be the most efficient way to accomplish this objective.

III. Analysis

The six options which may be pursued are as follows

1) External Legislation.

Under this option, Member states would enact a state law external to the Compact, stating that NGR members are eligible for the benefits provided by the Compact. As noted in the Short Answer above, the most straightforward option for including NGR members within the Compact is to adopt new legislation in member state which is external to the Compact, but provides similar benefits to NGR members. Importantly, this legislation would not amend the Compact language itself, nor would it need to purport to interpret the Compact in any way.

Properly-drafted legislation enacted by a state, external to its Compact statute, could reference the Compact and provide that identical benefits shall be afforded to NGR members within the state. Legislation of this kind has already been enacted in some member states, and similar bills are under consideration in others. Notably, this approach

also allows interested member states to pass this legislation without requiring coordination between them, and without impacting uninterested states in any way. Given that the political will already exists to enact this kind of legislation and that the process is already under way in numerous jurisdictions, continuing to enact external legislation extending the Compact's benefits to NGR members appears to be an imminently feasible and reliable answer to the question posed. In sum, this appears to be a scalable, reliable solution.

Notably, legislation of this kind must be carefully drafted to not conflict with the pre-existing language of the Compact, as any state law in conflict with the Compact will be superseded by the Compact itself. Model legislation can be presented to interested member states to ensure that the proposed external legislation does not inadvertently conflict with the Compact terms.

## 2) Memorandum of Understanding.

A less formal memorandum of understanding is an alternative path that has been proposed to include NGR members in the Compact, whereby interested member states may enter into a memorandum of understanding ("MOU") to allow for the Compact to be applicable to NGR members. It must be noted that this path would have a weaker legal foundation than the legislative option above. Under this method, an MOU would allow interested member states to adopt language interpreting the Compact as covering the children of NGR members without requiring the political procedures associated with passing a new state law. This option would allow interested member states to sign the MOU without impacting the rights or obligations of other member states which may not be interested in expanding the Compact in this way. As an MOU would not impact the substantive language of the Compact, it should not require ratification or approval by any member state's legislative body and would only require the approval of a state's MIC3 Commission.

However, because ratifying an MOU is an administrative rather than legislative action, the enforceability and effectiveness of such a memorandum is by the authority granted to the state's Compact Commission. If challenged in court, it is conceivable that the MOU would be deemed to be beyond that authority granted to the Commission under the Compact. While it is difficult to say with any certainty how a legal challenge might play out, the possibility of such a challenge is a serious drawback to this course of action and, on balance, leads us to decline to endorse this path.

## 3) Sub-Compact.

A third proposed option is the creation of a new sub-compact, within the existing Compact, to extend the benefits of the Compact to apply to NGR members in states which have joined the sub-compact. While this option is similar to the MOU approach described above, it would require legislative approval for any state interested in joining the sub-compact. Moreover, creating a sub-compact with the Compact is likely to require very careful and specific drafting in order to appropriately tailor the impact and scope of the new sub-compact. While a sub-compact of this nature would have the force of state law, and thus be more enforceable than an MOU, it would require extensive drafting work which will doubtless increase the cost and time required to pursue this option. As this method would be administratively complex and expensive, we would likewise not endorse this path to address the present concerns.

## 4) Separate Compact.

Another option is that a separate secondary compact may be created whereby interested member states allow for the Compact to include National Guard and Reserve members. Enacting another separate compact to expand the Compact is an unnecessarily complicated way to achieve the stated objective. A second compact would, like options one and three above, require the full approval of the legislative body for each state entering into it. As such, this

second compact would involve significant amounts of time and work to draft, debate, and pass in each state. Assuming that such a feat can be accomplished for each interested member state, a separate compact would unnecessarily divide the effect and authority of the MIC3 between two separate pieces of legislation; as always, this complication is likely to result in increased cost and confusion in the enforcement of this law. For context, a current estimate by the Council of State Governments puts the cost of establishing a separate compact at approximately \$761,000.

5) Compact Amendment.

The Compact may be directly amended through state legislation in each member state which states that the Compact shall apply to National Guard and Reserve members. While an amendment to the Compact may be a more direct route to accomplish the present objectives, it would require the coordinated participation and approval of the legislative body in every member state. Even more so than the other options discussed above, this would require concentrated and coordinated efforts in the government of each member state to pass identical language amending the Compact. Should this effort fail to be approved by even one member state, the amendment would fail in its entirety, and it would not be effective for any member state. Several of the options above are better suited to address this problem, as they allow interested member states to opt-in, while not requiring the participation or approval of uninterested member states. Given the scale of the Compact and the complex nature of the political questions involved in amending it, employing a scalable solution to this problem is essential.

6) No Action.

Finally, there remains the option to decline to take any action at this time. While this approach does not address the stated objective immediately, there is prudence in gathering additional information to better ascertain the scope of the current concern. Further, the member states which choose this option may do so in conjunction with other states choosing the non-coordinated options set forth above.

IV. Conclusion

Based on current information, new state legislation enacted outside the Compact in interested member states providing identical benefits to NGR members is likely to be the most efficient way forward as this solution is scalable, legally sound, and would have a uniform impact. With the growing use of NGR members in recent years, this issue is one of growing importance that deserves prompt attention.