MIC3 MILITARY INTERSTATE CHILDREN'S COMPACT COMMISSION

**Legal Memorandum**

**To: Compact Commissioners and Designees**

**From: Rick Masters, General Counsel**

**Re: The Compact and National Guard & Reserve Dependents**

**Date: November 19, 2021**

At the request of the Executive Committee, I'm writing to clarify the legal concerns which were raised in the discussion of the above issue concerning the proposal to extend the protections of MIC3 to the families of National Guard and Reserve Members.

While I regret the uncertainty and confusion caused by expression of my concerns to you as Commissioners at the Annual Business Meeting (ABM), my only intention was to make sure a mistake was not made in this regard and delaying a decision for a short time seemed to be wiser than approving an alternative about which there are legitimate legal reservations.

In retrospect, it would have been more prudent under my obligation and responsibilities as counsel of the Commission, to have at least expressed general legal concerns in advance of the ABM to the officers and staff of the Commission rather than to do so during the ABM. I express my deepest apologies to the officers, staff, and members of the Commission for any resulting discomfort and inconvenience.

My original understanding was that the Commission's consideration of this issue solely would be to vote to approve the inclusion of the children of National Guard and Reserve families through legally appropriate means, up to and including amendment to the MIC3 Compact.

The National Guard/Reserve issue has a history of some degree of uncertainty and there are still some remaining questions although clearly an increasing number of states are receptive to the general concept of including these families among those who are also included in the educational transitions between state public school districts. Unfortunately, there was not sufficient time to discuss the issue in terms of legal concerns raised by some recent case law concerning enforcement of other laws (or agreements.) In my opinion, such developments need to be considered before voting on the alternatives that were proposed for approval by the Commission and subsequent to which, issues such as financing the means chosen to do so need to be considered.

The original Motion in this regard appeared to include the approval of a Memorandum of Understanding ("MOU") as, in essence, a substitute for an amended Compact. This raises serious doubts about the authority of states to use a unilateral amendment of the Compact by

legislation and, under the same legal principle, by individual Memoranda of Understanding (MOU's) as an alternative to the Compact.

Some of these concerns are based upon a very recent compact case from 2020 questioning alternative state action which may conflict with an existing compact in *Delaware River Joint Bridge Commission v. Oleksiak, infra.* This case is unresolved and is still in litigation.

In *Oleksiak,* the Court also found no language in the Compact allowing Pennsylvania or New Jersey (member states) to modify the Compact through legislation "concurred in" by the other state. Thus, each state's legislation could not bind the Commission if not allowed for in the member states' respective laws. See *Oleksiak infra.*; *Intl. Union of Operating Engineers, Local 542 v. Delaware River Jt. Toll Bridge Commission, 311 F. 3d 273, 276 (3rd Cir. 2002); Delaware. River Jt. Toll Bridge Commission v. Oleksiak 2020 WL 1470856, __ F.3rd ___(2020).* While this case was decided in late 2020, an appeal of this case to the U.S. Court of Appeals and possibly to the U.S. Supreme Court could delay its finality and thus its ultimate effect.

This case also relied on earlier case authority in this regard by the U.S. Supreme Court which held "It is clear that an interstate compact agency takes orders only from parent states **acting in unison** (legislatively), not from an individual state party to the compact acting unilaterally." *Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994).*

The court also reviewed several other decisions in which Pennsylvania, New Jersey, and federal courts have concluded that not even a member state court may unilaterally impose duties on the Commission that the Compact did not specify.

"[W]hen enacted, a Compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties." It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the Compact absent the concurrence of the other signatories." *Hess, supra*.; *C. T. Hellmuth & Assocs., Inc. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 409 (D. Md. 1976).*

In my opinion, under the above legal principles, the legally permissible means of accomplishing the objective of including the families of National Guard and Reserve Members is to vote to amend the Compact, which must be agreed upon, and enacted by all member states. Alternatively, individual states are free to enact legislation outside the statutory provisions of the Compact. Kentucky and Arkansas have passed legislation that is outside their state's legislation authorizing the Compact. The following example of such language is based on *Kentucky Revised Statutes § 156.735*:

> *(1) Notwithstanding any other statutes to the contrary, students who are children of members of the National Guard and Reserve shall be afforded the same rights as students of active duty military families under* [enter cite for state statute in which the

MIC3 Compact is contained] *if the parents are required to move to perform their responsibilities in the service of the National Guard or Reserve resulting in the students having to transfer from a public school in one state to a public school in another state.*

*(2) As used in this section, "student" means the child of a member of the National Guard of Reserve for whom the local education agency receives public funding and who is formally enrolled in kindergarten through twelfth grade.*

In summary, the Commission has the following options to consider: 1. vote to amend the Compact, after which all member states must enact the amendment before it becomes effective; 2. enact legislation outside the compact such as Kentucky and Arkansas; or 3. vote not to amend the compact.