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**SB 2341****Senate Workforce Development Committee****January 6, 2025****Education Standards and Practices Board**

Good afternoon, Chairman Wobbema and members of the Senate Workforce Development Committee. My name is Rebecca Pitkin, and I am the Executive Director of the Education Standards and Practices Board (ESPB). I represent our Board in opposition to SB 2341, relating to a School Psychologist Interstate Compact. The Board believes that an efficient and cost-effective pathway for out-of-state licensure for school psychologists is already in place in North Dakota, and that this bill seeks to remedy a problem that does not exist. This bill, in fact, may have the opposite effect, and may create a more costly and cumbersome licensure process for these prospective school psychologists. ESPB was part of a Board study (SB2249, 68<sup>th</sup> Legislative Assembly), which examined Board practices for out of state practitioners. The study revealed the following results:

1. Once materials are submitted, ESPB issues the license within 2 days
2. Our out of state educator license (OSEL) administrative rules make the transition very smooth and there is not burdensome red tape
3. ESPB waived fees for military members and their spouses in 2018.
4. ESPB promulgated rules to allow national certification to count for reeducation credits, thus raising the standards for our school psychologists.

The Board articulated several other concerns with the bill:

1. Currently, out of state licensed individuals coming to North Dakota do not have to maintain their other state license as required in the bill; this is a cost to licensees (Article VII-1a)
2. Although we have received information of the estimated fiscal impact of membership from the Council of State Governments (CCGS), there are not clear details regarding financing of the commission, nor are there exact requirements of participation. There are also potential travel and attorney fees. Our Board believes without concrete financial information, it is not wise to use licensure fees for the unknown. In addition, fees would be assessed to the applicant as we are a fee funded agency, and this could be a significant new financial burden for the 82 school psychologists and eight interns in our state.
3. The language on page 11 and page 12, relating to closed meetings may conflict with our §44.04-17.1 statute relating to open meetings.

4. Article XIII states any laws, statutes, regulations, or other legal requirements in a member state in conflict with the compact are superseded to the extent of the compact. This is a Board concern.
5. Our Board wonders what the barriers currently are as ND has one of the nation's most flexible Out of State Educator licensing systems and the language in the bill will not create additional school psychologists.
6. A school psychologist moving to a compact state would still have to apply and pay for the license in that state.
7. We currently have a system in place to facilitate licensure and discipline information for relocating school psychologists. We have an interstate agreement with all 50 states and Canadian provinces. We also belong to the National Association of State Directors of Teacher Education and Certification and check every applicant with Clearinghouse which contains actions taken against the license of an educator by other states/jurisdictions U.S. Department of Defense Educational Opportunity School, and Guam.

ESPB has worked collaboratively with the North Dakota Association of School Psychologists (NDASP) to problem solve and the NDASP developed a scope of practice, now in our administrative rules. We also worked collaboratively to develop rules for a school psychologist intern. Our Board desires to continue the conversation about ways we can increase the number of school psychologists in North Dakota. Our Board believes the compact, as written, will create a burden to our current practices, additional fees will be imposed on current school psychologists, and potentially create problems which do not exist.

Enclosed in this testimony is a letter from the attorney general's office regarding the Interstate Teacher's Compact, as well as the response from the Interstate Teacher Mobility Compact legal counsel. Many of the concerns expressed in the letter also apply to SB 2341.

Working together to impact the school psychologist shortage is needed; SB 2141 is not the solution.

Rebecca Pitkin, PhD

Executive Director

701.590.1861

August 29, 2024

North Dakota Military Commission  
c/o Administrator LTC Jay G. Sheldon  
North Dakota National Guard  
Strategy and Policy Officer

via email only [jay.g.sheldon.mil@army.mil](mailto:jay.g.sheldon.mil@army.mil)

Dear LTC Sheldon:

I serve as the General Counsel for the Education Standards and Practices Board (“ESPB” or “Board”). On July 11, 2024, you reached out to Dr. Rebecca Pitkin, Executive Director of ESPB and indicated that the North Dakota Military Commission (“NDMC”) intended to pursue the Interstate Teacher Mobility Compact (“Compact”) during the 2025 North Dakota Legislative Session, and requested any feedback on issues or concerns. ESPB appreciates the opportunity to submit additional information and follow up concerns regarding the Compact, and I submit this letter on the Board’s behalf.

First, I’d like to bring your attention to a constitutional concern regarding Article VII, Section C which creates a Commission that would subsequently implement vast regulations that would have “standing as statutory law” and have “the force of law and shall be binding in all Member States” without ever coming before the North Dakota Legislature for adoption or approval. The N.D. Supreme Court has recently held that only the North Dakota Legislature has the power to create statutory law and it may only delegate the authority to administer or execute law if the delegated power is “constrained by reasonably clear guidelines and sufficiently objective standards” with “procedural safeguards” against “arbitrary action” in place.<sup>1</sup> Only regulations promulgated through the Administrative Agency Practices Act, codified at N.D.C.C. ch. 28-32, may be adopted for use of regulatory purposes<sup>2</sup> and it is considered an unconstitutional delegation of legislative authority for statutes to adopt future laws, rules, or regulations.<sup>3</sup> The concern is the Compact gives

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<sup>1</sup> North Dakota Legislative Assembly v. Burgum, 2018 ND 189.

<sup>2</sup> Little v. Spaeth, 394 N.W.2d 700 (ND 1986).

<sup>3</sup> State v. Julson, 202 N.W.2d 145 (ND 1972) (“statutes adopting laws or regulations of other states, the federal government, or any of its agencies, effective at the time of adoption are valid, but attempted adoption of future laws, rules or regulations of other states, or of the federal government, or of its commissions and agencies generally have been held unconstitutional as an unlawful delegation of legislative power.”); see also McCabe v. N.D. Worker’s Comp., 567 N.W.2d 201 (N.D. 1997) (a statute that attempts to incorporate future changes of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power and thus courts will interpret “most recent” and “most current” as that in existence at the time of the statutory enactment). See also Weber v. Weber, 512 N.W.2d 723 (concurring opinion recognizing that a regulatory board may not use of version of an ethical code it has not legally adopted in North Dakota via the Administrative Agencies Practices Act).

the Commission authority to go beyond administering and executing the Compact enacted into statutory law without clear guidelines and standards, and no procedural safeguard to protect against arbitrary action. Under current North Dakota case law, it would be an unconstitutional delegation of legislative power to adopt unknown and unidentifiable future rules of the Commission. ESPB would therefore request the Compact language be amended to recognize any rules would be advisory only and would only have the force and effect of law if specifically adopted by Member States via the state's own administrative agencies practices act.

In addition, Article X on Oversight, Dispute Resolution, and Enforcement raises several concerns. The Compact provides that it does not waive the State's sovereign immunity, see Article VII(A)(2), but then contradicts itself by allowing the Commission to sue a member state for money damages, dictate venue, jurisdiction, and promulgate rules for mediation and binding dispute resolution. Unless otherwise specified by the North Dakota Legislature, North Dakota does not consent to jurisdiction and venue outside of the state.<sup>4</sup> Since the Compact is silent on the specific venue, "rules" implemented by the Commission conflicting with our State Constitution and law regarding jurisdiction and venue would be unenforceable.<sup>5</sup> Furthermore, North Dakota law requires the approval of the Attorney General and director of the Office of Management and Budget to consent to arbitration, and will only be given after a complaint has been made.<sup>6</sup> Any such contradictory "rule" of the Commission would therefore, again, be unenforceable.<sup>7</sup> Finally, the provision regarding the payment of costs and fees of an unknown, unspecified amount is void under N.D.C.C. § 28-26-04.

Finally, we also have the following general concerns, questions, and comments, which were discussed at the August 8, 2024, ESPB Meeting with a representative of NASDTEC, however a majority of the responses were dependent upon what the representative anticipated the Commission would adopt as rules and did not resolve the concerns:

- Article II- repeatedly refers to licensure of teachers of preschool children and licensure of teachers only in public educational settings. North Dakota does not regulate or license preschool educators in the same manner as teachers, and teaching licenses issued by ESPB apply to teachers in both public and private K-12 schools. Will private school teachers not be eligible for these Compact licenses?<sup>8</sup>
- Article II(R)- ESPB also issues licenses and certificates to individuals who provide services outside of those who are traditionally thought of as classroom teachers, including school psychologists who have their own Compact. Does this interfere with other Compacts?

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<sup>4</sup> N.D. Const. art. 1, § 9; N.D.C.C. § 54-01-18; N.D.C.C. § 32-12-02; N.D.C.C. § 32-12.2-10.

<sup>5</sup> Amica Life Insurance Co. v. Wertz, 462 P.3d 51 (CO 2020).

<sup>6</sup> N.D.C.C. § 32-12.2-05.

<sup>7</sup> Amica Life Insurance Co. v. Wertz, 462 P.3d 51 (CO 2020).

<sup>8</sup> See Art. II(D), (K), (R), and (S).

- Article III(C)- requires that a Receiving State grant a license to an applicant who holds an Unencumbered Eligible License issued by a Member State which is equivalent to the license held by the Teacher in any other Member State. Currently, there are statutes, such as N.D.C.C. § 15.1-13-26, which serve as a permanent denial of a teaching license. Other states may not have the same or similar statutes and may have issued a license. Is North Dakota going to retain the discretion to deny for reasons other than coursework, degrees, testing, etc.? What about CHRI?
- Article VII(D)(7)(c) – impose fees – There is no estimate of the fees the Member State will be responsible for. If this fee is high, it could impact licensure fees for teachers in the state.
- Article VII(D)(7)(d) – “except by and with the authority of the Member State.” There is no indication whose authority this is referring to-the delegate of the Member State? Legislature? ESPB?
- Article VII(D)(8) – the North Dakota Legislature cannot provide immunity from suit and liability for Commission employees without being politically accountable for and defining the contours of the scope of employment of Commission employees. The purported extension of this immunity to persons that possessed a mere reasonable belief they were acting within the scope of employment further fails to properly confine the classification to legislatively identified and limited activities.
- Article X(C) – (F) – only the North Dakota Legislature could repeal the Compact, therefore it is unclear what effect this “termination” would have.
- Article X(I) – the North Dakota Legislature can repeal the Compact during session and without a law in place, any sort of “enforcement” beyond the repeal date would be unenforceable.

Additionally, ESPB would note that it was the first regulatory board to, without legislative requirement, waive licensure fees for military members and spouses, and that ESPB maintains an extremely expedited licensure turnaround time. Therefore, it is unclear what North Dakota would gain from the entry into this Compact.

ESPB appreciates your dedication to our military members, and this opportunity to provide feedback on this Compact. Please reach out with any further questions.

Sincerely,

Allyson M. Hicks

LTC Jay Sheldon  
August 29, 2024  
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Assistant Attorney General  
General Counsel  
Education Standards and Practices Board

cc: Board of Occupational Therapy Practice`



November 21, 2024

Office of the Attorney General  
General Counsel Division  
ATTN: Allyson M. Hicks  
600 E. Boulevard Ave Dept. 125  
Bismarck, ND 58505-0040

**RE: North Dakota Military Commission Interstate Teacher Mobility Compact**

Ms. Hicks:

This letter is in response to the letter my client received dated September 6, 2024, regarding the constitutionality of the Interstate Teacher Mobility Compact ("ITMC"). While North Dakota's ESPB is a leader in Military Licensing fees, the Military Commission Interstate Teacher Mobility Compact aims to provide uniform mobility to individuals transitioning to the compact's member states. The U.S. Constitution (Art. 1, Sec. 10, Clause 3) grants states the right to enter into multistate agreements for their common benefit.

As you are aware, the Art. VII, Section 10 of the North Dakota Constitution, provides that:

Agreements, including those for cooperative or joint of administration of any powers or functions, may be made by any political subdivision with any other political subdivision, with the state, or with the United States, unless otherwise provided by law or home rule charter. A political subdivision may by mutual agreement transfer to the county in which it is located any of its powers or functions as provided by law or home rule charter, and may in like manner revoke the transfer.

Furthermore, North Dakota law provides that the delegation of legislative power is subject to specific limitations:

1. The Legislature may not delegate its purely legislative powers unless expressly authorized by the State Constitution;
2. The Legislature can delegate the authority to execute laws it enacts, provided there are adequate standards and procedural safeguards;
3. The power to ascertain facts that bring a law to operation is not an unconstitutional delegation as long as the law sets forth clear guidelines; and
4. The Legislature may delegate even purely legislative powers to political subdivisions if authorized by the state constitution.

The North Dakota Supreme Court has consistently held that the Legislature may delegate certain powers, provided these delegations do not involve the creation of new laws but rather the execution of existing laws. This principle allows for the delegation of authority to enter into

interstate compacts, as long as the compact's execution adheres to the provisions set by the Legislature.<sup>1</sup>

The court has also recognized the necessity of delegating powers in complex areas, provided there are adequate standards and procedural safeguards. This modern view of the non-delegation doctrine is crucial for understanding the legality of interstate compacts, which often involve intricate and multi-jurisdictional issues.<sup>2</sup>

Regarding interstate compacts specifically, the North Dakota Supreme Court has upheld such delegations, provided they do not increase the political power of the states in a manner that encroaches upon or interferes with federal supremacy. This aligns with the U.S. Supreme Court's interpretation of the Compact Clause, which limits agreements that tend to increase the political power of the states at the expense of federal supremacy.<sup>3</sup>

Furthermore, the Legislature may delegate even purely legislative powers to political subdivisions if authorized by the state constitution. This provision supports the delegation of authority to enter into interstate compacts, as long as the delegation is within the constitutional framework.<sup>4</sup>

#### I. Article VII, Section C—Free Standing Commission

Even though the subject statute creates a commission, the Legislature is assenting to its creation. The North Dakota Legislature maintains the ability to delegate their regulatory authority to Compacts.<sup>5</sup> North Dakota is a member of many interstate compacts, including those which the legislature have delegated state rulemaking authority: the Interstate Medical Licensure Compact, the Nurse Licensure Compact, the Physical Therapy Licensure Compact, the Counseling Compact, the Psychology Interjurisdictional Compact, the Emergency Medical Services Personnel Licensure Compact, the Interstate Compact for Adult Offender Supervision, the Interstate Compact for Juveniles, the Military Interstate Children's Compact, and others.<sup>6</sup>

A state has a “general right of sovereignty” to reach an agreement with a fellow state and enter a compact that “become[s] conclusive upon all the subjects and citizens thereof, and bind[s] their rights.” *Pooler v. Lessee of Fleeger*, 36 U.S. 185, 209 (1837). Each state’s “acceptance of the compact” is considered the “act of the people” of that state “in their sovereign character.” *Green v. Biddle*, 21 U.S. 1, 88 (1823). Thus, by enacting a compact, member states are addressing a policy problem through shared or joint exercise of sovereignty. This is a sovereign choice by each state.” Michael L. Buenger *et al.*, *The Evolving Law and Use of Interstate Compacts*, 50 (2d ed. 2016).

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<sup>1</sup> *Ralston Purina Co. v. Hagemester*, 188 N.W.2d 405 (N.D. 1971)

<sup>2</sup> *Trinity Medical Ctr. v. North Dakota Bd. of Nursing*, 399 N.W.2d 835 (N.D. 1987)

<sup>3</sup> *Gray v. N.D. Game & Fish Dep't.*, 2005 ND 204 (N.D. 2005)

<sup>4</sup> *County of Stutsman v. State Historical Soc'y*, 371 N.W.2d 321 (N.D. 1985)

<sup>5</sup> See *Trinity Medical Ctr. v. North Dakota Bd. of Nursing*, *supra*.

<sup>6</sup> See “North Dakota” National Center for Interstate Compacts, accessed via <https://compacts.csg.org/state/north-dakota/>. Last accessed on October 16, 2024.



And in compacting together, states may assign administrative or regulatory authority to an interstate commission created under the compact.<sup>7</sup>

The Teaching Compact presented does not promulgate or delegate any more authority than the compacts named above which the North Dakota Legislature have already joined.

## II. Dispute Resolution

When the North Dakota Legislature adopts the compact, the legislature is authorizing the dispute resolution procedures as the compact would function as a statute. The compact would facially supersede the law but only to the extent of the conflict. Again, the compacts listed above to which North Dakota is a member state contain similar language regarding dispute resolution procedures.

## III. General Concerns and Comments

### *Article II—Preschool and Private School Teachers*

Inherently, the compact governs teacher licensure, exclusive of whether that teacher chooses to utilize their licensure in a public or private setting. Similar to the North Dakota statute<sup>8</sup> on Teacher Licensure, there is no strict delineation between private and public schools within the compact. However, as long as the license held by a private school teacher grants the authority to teach in a public school, they would be deemed eligible for reciprocity under the compact. Current employment does not dictate eligibility—licensure does. Early education licenses would not be required to be eligible under the ITMC if the member state does not license them to the level of eligibility described in Art. II of the Compact.

### *Article II(R)—Licensure for Individuals who Provide Services Outside of Teaching*

Succinctly, this compact will not interfere with other interstate compacts. The ITMC specifically covers teachers that provide instruction to a specific population, age or grade band, or on a subject area as the teacher of record. While other professionals in schools may hold a license issued by the same agency, they would not be eligible for the compact. The ITMC also would not

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<sup>7</sup> See also *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding a compact creating an interstate tax commission without congressional consent); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) (upholding West Virginia's entry into a water-sanitation compact creating an interstate commission, against arguments that it violated the state's constitution by delegating legislative power and the police power and binding future legislatures to make appropriations) *rev'g* 134 W. VA. 278 (1950); *Scott v. Commonwealth*, 54 Va. App. 142, 147-50 (2009) (addressing arguments under the Interstate Compact for Adult Offender Supervision and rules promulgated by its Interstate Commission for Adult Offender Supervision); *Buenger et al.* at 128 (“neither the establishment of [compact commissions] nor their exercise of regulatory power is legally problematic with respect to constitutional prohibitions against the delegation of state authority”).

<sup>8</sup> N.D. 67.1-02-02

interfere with any current or future compacts that deal with the licensure of other education professionals (including the ICSP).

*Article III(C)—Denial Discretion*

As stated in the following provisions of the ITMC model language, the licensing agency maintains broad authority to determine licensure issuance. Art. III(C): “Upon the receipt of an application for licensure by a Teacher holding an Unencumbered Eligible License, the Receiving State shall determine which of the Receiving State’s Eligible Licenses the Teacher is qualified to hold and shall grant such a license or licenses to the applicant. Such a determination shall be made in the sole discretion of the Receiving State’s Licensing Authority and may include a determination that the applicant is not eligible for any of the Receiving State’s Eligible Licenses.”

In addition to the denial discretion in Art. III, Art. VI(A) of the Model Language provides: “Nothing in this Compact shall be deemed or construed to limit the authority of a Member State to investigate or impose disciplinary measures on Teachers according to the State Practice Laws thereof.”

*Article VII (D)(7)(c)—Fees*

The Compact has no direct mechanism to impose a licensing fee on applicants; that determination is left to the member State licensing authorities in their respective discretion. While there may be dues assessed to the state, the Compact statute itself is not an allocation of a State’s budget or general funds.

*Article VII(D)(7)(d)—Delegation of Authority*

The ability to appropriate or earmark funds is state constitution dependent. In North Dakota, the appropriation power appears to be delegated to the Legislature. Thus, the language “except by and with the authority of the Member State” refers to the Legislature’s earmark, appropriation, or other funding mechanism.

*Article X(C)—(F)—Effect of Termination in Event of Default*

North Dakota may be removed from the compact in the event of default. However, the compact contains language to place guardrails on licensees who are attempting to obtain a license from the Defaulting State. This includes a six (6) month “offboarding” window wherein pending applications may be processed by the state and provide opportunity to the individual such that they may explore stand alone licensure requirements.

*Article X(I)—Repeal of the ITMC*

The issue raised in the initial letter is largely similar to that of the concern surrounding Art. X (c)-(f). While there are no real damages for repealing the compact, the Compact aims to provide an “off ramp” to states to follow so that individuals pursuing licensure under the Compact have opportunity to explore alternative avenues for licensure in the event of repeal.

It is my hope that the foregoing explanation serves to assuage concerns regarding the model legislation for the ITMC. Please feel free to reach out with any additional questions or concerns or to discuss further.

Sincerely,

A handwritten signature in cursive script that reads "Samantha T. Nance".

Samantha T. Nance  
Counsel, Interstate Teacher Mobility Compact

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NOV 27 2024  
ESPB