

**JUDICIAL OVERSIGHT OVER THE INTERSTATE  
PLACEMENT OF FOSTER CHILDREN: THE MISSING  
ELEMENT IN CURRENT EFFORTS TO REFORM THE  
INTERSTATE COMPACT ON THE PLACEMENT OF  
CHILDREN**

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I. INTRODUCTION

The Interstate Compact on the Placement of Children (ICPC or Compact), a uniform state law governing the interstate placement of children in foster care,<sup>1</sup> is under attack. Policymakers, academics, and advocates have criticized the statutory scheme for being unworkable and unnecessarily impeding children's permanent placement with their parents or relatives.<sup>2</sup> Judges, frustrated with delays in the interstate placement

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<sup>1</sup> 42 U.S.C. § 671(a) (2006). See *infra* notes 4–8 and accompanying text, for a brief discussion of the ICPC.

<sup>2</sup> See, e.g., Madelyn D. Freundlich, *Reforming the Interstate Compact on the Placement of Children: A New Framework for Interstate Adoption*, 4 HYBRID 15, 30–31 (1997) (recognizing that outcomes for children under the ICPC “have been at best troubling, and at worst dire”); Julius Libow, *The Interstate Compact on the Placement of Children—A Critical Analysis*, 43 JUV. & FAM. CT. J. 19, 19 (1992) (“[T]he Compact itself becomes the problem, not the solution and at times endangers the well-being of children.”); John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J. L. REFORM 57, 57 (2006) (addressing “the critical need for reform of the Interstate Compact”); Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 444 (2006) [hereinafter *Perpetuating Impermanence*] (“[The ICPC] has created a system in which foster children awaiting interstate placements languish in temporary placements indefinitely.”); Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL’Y REV. 63, 67 (2006) [hereinafter *Out of Luck*] (“[T]he current application of the ICPC violates the constitutional and custodial rights of parents and increases the likelihood that children will unnecessarily remain in foster care.”); Letter from Center for Family Representation to Jerry Friedman (Mar. 10, 2008) (on file with author).

process, have found creative ways to avoid strict compliance with the law.<sup>3</sup> In 2006, the federal government intervened and enacted legislation to expedite the completion of interstate home studies and mandate that each state assess its interstate placement procedures.<sup>4</sup> Recently, state child welfare agencies, under the leadership of the American Public Human Services Association, drafted a proposal to reform the ICPC, which is currently being introduced in state legislatures across the country.<sup>5</sup> A consensus has emerged that the current system is flawed and needs a massive overhaul.<sup>6</sup> Preserving the status quo is not an option.

Yet, notably absent from the current debate on reforming the ICPC is any consideration of creating judicial oversight over the interstate placement process, which has been absent since it was drafted in 1960. Under the Compact, the child welfare agency in the state in which the proposed caretaker resides has the exclusive authority over placement

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<sup>3</sup> See, e.g., N.J. Div. of Youth and Family Servs. v. K.F., 803 A.2d 721, 728–29 (N.J. Super. Ct. App. Div. 2002) (finding the ICPC inapplicable to placements of foster children with relatives); Crystal A. v. Lisa B., 818 N.Y.S.2d 443, 447 (N.Y. Sup. Ct. 2006) (holding the ICPC inapplicable where grandparents filed a separate custody action regarding foster children); State of Fla., Dep't of Health and Human Servs. v. Thornton, 396 S.E.2d 475, 481 (W. Va. 1990) (holding that the best interests of the child trumps strict compliance with the Compact); see also ARK. SUPREME COURT AD HOC COMMITTEE ON FOSTER CARE AND ADOPTION, ARKANSAS COURT IMPROVEMENT INTERSTATE PLACEMENT OF FOSTER CHILDREN ASSESSMENT REPORT 41, 63 (2008) [hereinafter ARK. COURT IMPROVEMENT REPORT], available at [http://www.abanet.org/child/rc/ij/placement\\_assessments/AR\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rc/ij/placement_assessments/AR_icpc_assessment.pdf) (reporting that 72% of judges have entered a custody order for an out-of-state placement and terminated jurisdiction to avoid compliance with the ICPC).

<sup>4</sup> § 671(a).

<sup>5</sup> See AM. PUB. HUMAN SERVS. ASS'N, ASS'N OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, PROPOSED LEGISLATIVE LANGUAGE FOR THE NEW ICPC, [http://www.aphsa.org/Policy/ICPC-REWRITE/Proposed%20Legislative%20Language/PROPOSED\\_LEGISLATIVE\\_LANGUAGE09.pdf](http://www.aphsa.org/Policy/ICPC-REWRITE/Proposed%20Legislative%20Language/PROPOSED_LEGISLATIVE_LANGUAGE09.pdf) [hereinafter NEW ICPC]. See Association of Administrators of the Interstate Compact on the Placement of Children, [http://icpc.aphsa.org/Home/home\\_news.asp](http://icpc.aphsa.org/Home/home_news.asp) (last visited Aug. 27, 2009), for more information about efforts of the American Public Human Services Association to reform the Compact.

<sup>6</sup> See Erik Eckholm, *Waits Plague Transfers of Children to Relatives' Care*, N.Y. TIMES, June 27, 2008, at A11; Megan O'Matz & Sally Kestin, *Foster Kids Get Lost in Out-of-State Paperwork*, ORLANDO SENTINEL, June 16, 2002, at B5; Megan O'Matz & Sally Kestin, *Children Lost Despite Pact Among States; Cumbersome Placement Process Fails*, S. FLA. SUN-SENTINEL, June 9, 2002, at 1A; Rita Price, *Couple Fights for Abused Grandson*, COLUMBUS DISPATCH, Aug. 17, 2009, at A1.

decisions, which are based on its determination of whether the placement is “contrary to the child’s interests.”<sup>7</sup> If that agency denies the placement, the statute explicitly prohibits courts from reviewing and overturning the agency’s determination.<sup>8</sup>

Consider the following illustrative example. A child in Michigan is removed from his mother’s care and placed in a temporary foster home. The child’s grandmother, who lives in Tennessee, requests immediate custody of the child. All parties to the case agree that the placement is in the child’s best interest, but under the Compact, the juvenile court judge cannot make the placement until the Tennessee child welfare agency makes a determination that the placement is not contrary to the child’s interest, a process that may take months if not years.<sup>9</sup> If the Tennessee agency refuses to grant approval, the denial acts as an absolute veto of the placement, even if that agency’s decision is arbitrary, subjective, or capricious.<sup>10</sup> The ICPC explicitly bars *any* judicial review of the decision.<sup>11</sup> Despite the well-documented problems in the interstate placement process—lengthy delays in the completion of home studies, subjective decision-making, and inadequate due process protections—this system has persisted for over forty years.

This article argues that current efforts to reform the Compact are flawed because they lack an essential element: judicial oversight of agency decision-making. The first section explores the important role that juvenile

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<sup>7</sup> INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN art. III(d), *reprinted in* AM. PUB. HUMAN SERVS. ASS’N, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 10–11 (2002), [http://icpc.aphsa.org/Home/Doc/Guidebook\\_2002.pdf](http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf) [hereinafter GUIDE TO THE ICPC].

<sup>8</sup> See NEW ICPC, *supra* note 5, at art. VI(B) (stating that an agency’s determination to deny placement “is not subject to judicial review”).

<sup>9</sup> See *Jon S. v. Dept. of Health and Soc. Servs., Office of Children’s Servs.*, 212 P.3d 756, 771 (Alaska 2009) (describing a placement that took nearly two years to complete); see also Lore, *supra* note 2, at 73 (citing problems with the Compact, including “excessive time required to complete the placement process [and] delays in placement due to differing state adoption laws”). The importance of timely decision-making in child welfare cases cannot be understated. See Hon. Leonard P. Edwards, *Achieving Timely Permanency in Child Protection Courts: The Case for Frontloading the Court Process*, 58 JUV. & FAM. CT. J. 1 (2007), for more information about reforms to expedite permanency for children.

<sup>10</sup> See *Out of Luck*, *supra* note 2, at 70 (“[A]rbitrary decisions by caseworkers are immune from judicial review, because the ICPC prohibits a court from overturning those decisions.”).

<sup>11</sup> NEW ICPC, *supra* note 5, at art. VI(B).

court judges play in making placement decisions for foster children. Next, an examination of the current problems in the interstate placement process demonstrates the vital need for judicial oversight of the system. Finally, a specific proposal is put forth on how best to incorporate judicial oversight without interfering with the sovereignty of states.

## II. THE NEED FOR JUDICIAL REVIEW

Child welfare agencies across the country are in disarray. Primarily staffed by overworked and underpaid caseworkers with little prior experience or training in child welfare,<sup>12</sup> few agencies have demonstrated the ability to adequately meet the needs of foster children under their purview.<sup>13</sup> Stories documenting the failures of these agencies are pervasive. Children in foster care remain missing for months.<sup>14</sup> Caseworkers overlook signs of child maltreatment in foster homes.<sup>15</sup> Families involved in the system complain of going months without seeing a caseworker.<sup>16</sup> Not surprisingly, outcomes for children raised by the

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<sup>12</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 106 (1997).

<sup>13</sup> See THE ANNIE E. CASEY FOUNDATION, *THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICES WORKFORCE* 41 (2003) (observing that the annual turnover rate in the child welfare workforce is 20% for public agencies and 40% for private agencies); Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILD. 75, 83 (2004) (noting that 90% of state child welfare agencies report difficulty in recruiting and retaining workers); Weinstein, *supra* note 12, at 106 (observing that many child welfare workers have “never actually received graduate or even undergraduate training in the field of social work”); Sari Horwitz & Scott Higham, *Foster Care Caseload “Just Horrible,”* WASH. POST, Mar. 27, 2000, at A1 (noting that child welfare agencies are generally understaffed and undertrained).

<sup>14</sup> See, e.g., Jack Kresnak, *Michigan Agency Loses 302 Children*, ASSOCIATED PRESS, Aug. 30, 2002, available at [http://www.fightcps.com/2002\\_08\\_25\\_archive.html](http://www.fightcps.com/2002_08_25_archive.html).

<sup>15</sup> See, e.g., *DeShaney v. Winnebago*, 489 U.S. 189 (1989) (documenting an instance where a child died after the state child welfare agency failed to conduct an adequate investigation); Richard Lezin Jones, *New Jersey Failed Basic Checks as Boys Starved, A Report Finds*, N.Y. TIMES, Feb. 13, 2004, at A1; John Sullivan & Craig R. McCoy, *Report Shows How DHS Failed*, PHILADELPHIA INQUIRER, June 1, 2007, available at [http://www.philly.com/inquirer/special/child\\_welfare/20070601\\_Report\\_shows\\_how\\_DHS\\_failed.html](http://www.philly.com/inquirer/special/child_welfare/20070601_Report_shows_how_DHS_failed.html) (describing a state report that found that children needlessly died because of systemic failures).

<sup>16</sup> Rene Stutzman, *More Than 70 Florida Caseworkers Lied About Efforts to Protect Children*, ORLANDO SENTINEL, Jul. 13, 2009, available at <http://www.pantagraph.com/>  
(continued)

foster care system can be abysmal.<sup>17</sup> These and other inadequacies have resulted in the entry of numerous consent decrees granting federal courts the power to manage state child welfare agencies.<sup>18</sup>

The disrepair of the executive branch in handling child welfare matters has increased the involvement of the judiciary to manage the process. Although the creation of juvenile courts dates back to the early twentieth century,<sup>19</sup> court involvement in child welfare cases substantially increased after the passage of the Adoption Assistance and Child Welfare Act (AACWA) of 1980, which was enacted due to Congress' concern that "too many children were entering the nation's foster care system, that they remained in the system too long and that too little effort was being made either to reunite foster children with their families of origin or to free them for adoption."<sup>20</sup> The AACWA increased judicial involvement by making federal funding of child welfare systems contingent on court review of agency decision-making.<sup>21</sup> For example, the AACWA mandated regular court reviews and required judges to make numerous written findings, including whether the agency made "reasonable efforts" to maintain children in their homes.<sup>22</sup> The judiciary's important role was reaffirmed in

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news/article\_c68d218e-6f52-11de-9e38-001cc4c03286.html (describing examples of caseworkers falsifying reports about their supposed inspection of homes).

<sup>17</sup> See WESTAT, INC., A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTH, PHASE 2: FINAL REPORT xvi (1991) (stating that many foster children end up in jail or public assistance, or otherwise represent an economic cost to society after exiting the foster care system); Robin Erb, *Children Who Age Out of Foster Care Often Have Tough Life Ahead*, DETROIT FREE PRESS, Nov. 30, 2008, available at <http://www.freep.com/article/20081130/SPECIAL01/811250425/1280>.

<sup>18</sup> See ChildrensRights.org, *Children's Rights Goes to Court to Fight for Children's Fundamental Rights to Be Protected from Harm—And to Grow up in Loving, Permanent Homes*, <http://www.childrensrightrights.org/reform-campaigns/legal-cases> (last visited Nov. 4, 2009) (listing active, pre-judgment cases in Oklahoma and Rhode Island, listing active cases in which court-ordered settlements or judgments are being monitored and enforced in eight states, and listing six closed cases that have been completed successfully in six states).

<sup>19</sup> See Marvin Ventrell, *The History of Child Welfare*, in CHILD WELFARE LAW & PRACTICE 132 (Donald N. Duquette & Marvin Ventrell eds., 2005).

<sup>20</sup> See Miriam Rollin et al., *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process*, in CHILD WELFARE LAW & PRACTICE, *supra* note 19, at 151.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 145, 152–57.

subsequent amendments to the AACWA captured in the Adoption and Safe Families Act (ASFA) of 1997.<sup>23</sup>

The increased responsibilities of juvenile courts did not end with the changes required by federal law. In recent years, a new movement has emerged, calling for a proactive juvenile court to protect the interests of children. Forced to fix both broken agencies and broken families, judges across the country have advocated for a new conception of the juvenile court judge, who not only resolves disputes, but also leads the problem-solving team.<sup>24</sup> As the leader of the team, the judge oversees all aspects of the case and enters orders to ensure “that the system as a whole functions as well as it can.”<sup>25</sup> This role “entails oversight that extends well beyond placing a child in foster care to including that children in out-of-home care receive the safety, permanence, and well-being promised them in federal and state law.”<sup>26</sup> Significant reforms such as the emergence of unified

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<sup>23</sup> *Id.*

<sup>24</sup> See Hon. Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1, 1 (1992); see also Bruce J. Winick, *Problem Solving Courts and Therapeutic Jurisprudence*, 30 FORDHAM URB. L.J. 1055, 1055 (2003) (“Recently, a range of new kinds of problems, many of which are social and psychological in nature, have appeared before the courts. These cases require the courts . . . to attempt to solve a variety of human problems that are responsible for bringing the case to court . . .”).

<sup>25</sup> Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 862 (1997) (“[T]he court is no longer a remote adjudicator but is heading a problem-solving team . . . . [T]he court will be taking a leadership role in seeing that all the players . . . work together so that the system as a whole functions as well as it can.”); see also Winick, *supra* note 24, at 1060 (“Not only is the judge the leading actor in the therapeutic drama, . . . the judge also assumes the role of director, coordinating the roles of . . . the actors, providing a needed motivation of how they will play their parts, and inspiring them to play them well.”).

<sup>26</sup> THE PEW COMMISSION ON CHILDREN AND FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 34 (2006), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>; Note, *Unified Family Courts and the Child Protection Dilemma*, 116 HARV. L. REV. 2099, 2109 (2003) (“[T]he [Unified Family Court] judge has a pretrial responsibility to direct the case by identifying the relevant issues, parties, and outcome goals . . . . [T]he judge is at once a mediator, negotiator, and planner, in addition to an adjudicator.”); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment and Unified Family Courts*, 65 MD. L. REV. 82, 93 (2006) (“Family court judges no longer function primarily as fault-finders or rights adjudicators but rather as ongoing conflict managers . . . . [T]he court assume[es] direct responsibility for children’s well-being rather than serving as a passive arbiter of disputes between adult claimants.”);

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family courts, “drug courts,” and “baby courts” have all expanded the authority of the judge.<sup>27</sup> At the core of these initiatives is the belief that an active and involved judiciary is needed to provide the leadership and accountability necessary to ensure that good decision-making occurs. This broad conception of the judge’s role stands in stark contrast with the non-existent role judges play when an interstate placement is sought.

Robust judicial monitoring of agency decision-making continues to be necessary for a myriad of reasons. As noted above, the unfortunate reality is that child welfare procedures are often conducted by young, inexperienced workers who lack specialized training and carry high caseloads.<sup>28</sup> Caseworkers generally do not have the time to meet with families or conduct comprehensive investigations.<sup>29</sup> Families regularly voice concerns about their inability to contact caseworkers, engage in meaningful conversations with them, or have their evidence considered.<sup>30</sup> Once caseworkers complete an investigation, they must often make very subjective determinations based on amorphous standards such as “the best interests of the child.”<sup>31</sup> Racial and cultural biases often seep into the

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Winick, *supra* note 24, at 1060 (“The new problem solving courts are all characterized by active judicial involvement, and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress.”).

<sup>27</sup> See *Unified Family Courts and the Child Protection Dilemma*, *supra* note 26, 2103–04 (2003) (“By 1998, thirty-three states and the District of Columbia had established or planned for some type of specialized court to handle family law matters.”); Boldt, *supra* note 26, at 98 (describing 2003 survey that found more than 1600 problem-solving court programs operating in all fifty states and the District of Columbia).

<sup>28</sup> See Weinstein *supra* note 12, at 106.

<sup>29</sup> See THE CHILD WELFARE POLICY AND PRACTICE GROUP, IMPROVING CHILD WELFARE 2 (2001), available at [www.childwelfaregroup.org/documents/FlaLegis.doc](http://www.childwelfaregroup.org/documents/FlaLegis.doc).

<sup>30</sup> See Jane O. Hansen, *Georgia’s Forgotten Children: States Child Case Workers Among Lowest-Paid in Nation*, ATLANTA JOURNAL-CONSTITUTION, Feb. 6, 2000, available at <http://www.gahsc.org/terrell/salaries3.html> (“National child welfare agencies recommend that no caseworker carry more than 17 cases. What is known, however, is that in Georgia, some child protective caseworkers carry as many as 60 families at a time.”).

<sup>31</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (observing that the Supreme Court “more than once has adverted to the fact that the ‘best interests of the child’ standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values”); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999) (conceding that the best interests standard is “somewhat amorphous”); Henry H. Foster, Jr., *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFF. L. REV. 1, 2 (1973) (noting that the best interests standard is an “amorphous concept which may serve as a basis for rationalization of any result”); Lynne Marie Kohm, *Tracing the Foundations of the Best* (continued)

decision-making and caseworkers may make choices based on formal policies and procedures, rather than individualized determinations.<sup>32</sup> Once they make a decision, a neutral party has few opportunities to review that decision.<sup>33</sup> Providing caseworkers with unbridled discretion to make those decisions only increases the likelihood of an erroneous determination.<sup>34</sup>

Judicial review, though imperfect, provides an opportunity to enhance the quality of decision-making. Generally speaking, decisions are best reached after a deliberative process that encourages participation, relies on the most accurate information, and provides a mechanism to review potentially erroneous decisions.<sup>35</sup> This is precisely what the judicial system is designed to do.

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*Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 373 (2008) (acknowledging that the best interests decision making process is “relatively unbridled” and “thoroughly subjective”).

<sup>32</sup> In recent years, a number of reports have been issued documenting racial biases present in child welfare decision-making, which has contributed to the disproportional presence of African-American children in the foster care system. *See generally* ROBERT HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY, SYNTHESIS ON DISPROPORTIONALITY IN CHILD WELFARE (2006), available at [http://www.racemattersconsortium.org/docs/BobHillPaper\\_FINAL.pdf](http://www.racemattersconsortium.org/docs/BobHillPaper_FINAL.pdf); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

<sup>33</sup> *See Unified Family Courts and the Child Protection Dilemma*, *supra* note 26, at 2111 (“Those who recognize these risks but ultimately support UFCs suggest possible safeguards, such as review by another judge or use of different judges for the factfinding and disposition phases of a case.”).

<sup>34</sup> *In re Gault*, 387 U.S. 1, 18–19 (1967) (“Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.”).

<sup>35</sup> *See id.* at 21 (“It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. Procedure is to law what scientific method is to science.”) (internal citation omitted); *Idaho v. Wright*, 497 U.S. 805, 819 (1990) (“The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination.”) (quoting 5 WIGMORE, EVIDENCE § 1420 (Chadbourn rev. 1974)); *Perry v. Leeke*, 488 U.S. 272, 283 n.7 (1989) (“The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.”) (quoting 5 WIGMORE, EVIDENCE § 1367); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (“In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”).

Prior to court hearings, parties conduct independent investigations to uncover facts relevant to the presenting issue. During the hearing, each side presents the information to a neutral arbiter—the judge—and is given the opportunity to challenge the other side’s information either by objecting to its admissibility or by cross-examining witnesses.<sup>36</sup> The participants are given the chance to present arguments as to why a particular decision must be reached pursuant to the applicable law.<sup>37</sup> The judge then renders a decision after considering all opinions and balancing various harms.<sup>38</sup> Parties dissatisfied with the process are given the chance to have the decision reviewed on appeal.<sup>39</sup> These basic procedures, which lie at the heart of the American conception of due process,<sup>40</sup> do not occur when an agency is given complete, unreviewable decision-making authority.

Judicial review is also crucial to safeguard the basic constitutional rights of families. Child welfare proceedings implicate the fundamental liberty interests of parents and children.<sup>41</sup> Parents possess a right to direct the upbringing of their children and the state bears the burden of proving parental unfitness prior to infringing upon that right.<sup>42</sup> Children also share an interest in preventing the erroneous separation of the family,<sup>43</sup> and if

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<sup>36</sup> See *Goldberg*, 397 U.S. at 270 (“[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”) (quoting *Green v. McElroy*, 360 U.S. 474, 496–97 (1959)).

<sup>37</sup> *Id.* at 269.

<sup>38</sup> *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (“[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”).

<sup>39</sup> See *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

<sup>40</sup> See *In re Gault*, 387 U.S. 1, 21 (1967).

<sup>41</sup> The Supreme Court has long recognized the fundamental rights of parents to make decisions regarding the upbringing of their children. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

<sup>42</sup> *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (“[A]s a matter of due process of law, [the father] was entitled to a hearing on his fitness as a parent before his children were taken from him . . .”).

<sup>43</sup> *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (“[T]he child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”).

they are placed in state custody, they have a heightened constitutional right to be free from physical, psychological, and emotional harm, which courts have interpreted to include the right to maintain relationships with family members.<sup>44</sup>

Without close judicial oversight of agency decision-making, constitutional violations are likely. United States Supreme Court Justice Louis Brandeis cautioned that “[e]xperience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”<sup>45</sup> The practices of child welfare agencies have certainly corroborated Justice Brandeis’ observations. Stories abound of children unjustly removed from their parents’ custody or children denied basic rights by state agencies responsible for caring for them.<sup>46</sup> These intrusions, infringing upon the constitutional rights of parents and children, are often rationalized by the need to protect children despite having little support in the law. Judges, who are trained to safeguard constitutional rights and whose discretion is limited by due process protections, are in the best position to prevent the state from overreaching into the protected realm of the family.

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<sup>44</sup> See, e.g., *Marisol A. v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996) (finding that children in foster care have a constitutional right to be protected from harm by the State, including harm created by the State’s failure to place them with family); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 993 (D.D.C. 1991) (holding that a foster child has a due process right to be free from psychological harm and, where necessary to safeguard against such harm, a right to “appropriate placements and case planning” by child welfare agencies); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1009–10 (N.D. Ill. 1989) (noting that a foster child’s right to be free from psychological harm could be infringed where the child is restricted access to family members).

<sup>45</sup> *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

<sup>46</sup> See, e.g., *Nicholson v. Williams*, 203 F. Supp. 2d 153, 257 (E.D.N.Y. 2002) (issuing a preliminary injunction that prevented the city from removing children from battered mothers who were fit to retain custody of their children solely because the mothers were battered); *State ex rel. A.T.*, 936 So. 2d 79, 85–86 (La. 2006) (reversing a lower court’s termination of parental rights after finding that child protective services provided “no rehabilitative services” to the removed child or the child’s parent); *In re James G.*, 943 A.2d 53, 86 (Md. Ct. App. 2008) (finding that child protective services failed to provide reasonable vocational assistance prior to terminating a father’s parental rights); Brian Dickerson, *Hard Lemonade, Hard Price*, DETROIT FREE PRESS, Apr. 28, 2008, at A1; Petula Dvorak, *Child Deaths Lead to Excessive Foster Care Placements, Critics Say*, WASH. POST, Jan. 8, 2009, at B4.

This section's intent is not to provide a comprehensive analysis of why judicial involvement in child welfare cases is essential. Instead, the purpose is to provide a basic overview of the main reasons why a system permitting judicial review is desirable and why a system lacking such review should raise concerns. The concerns noted above are only exacerbated in the interstate placement context because the child welfare agency, possessing unbridled discretion, has no incentive to act in a manner that prioritizes the interests of families. The receiving state agency is not invested in the case and does not form a close relationship with the child or parents. If that agency conducts a timely home study, thoroughly considers all of the relevant evidence, recognizes the constitutional rights of parents and children, and expedites the placement of children with their families, then, in all likelihood, more children will enter its jurisdiction. This, in turn, will trigger oversight responsibilities, which will burden an already overwhelmed caseworker who has many other duties. The family may also request public benefits, such as medical and educational services, which will cost the state a considerable amount of money. Few states have an incentive to ensure that the process runs efficiently.

In contrast, if the agency arbitrarily denies the placement or refuses to complete a home study in a timely manner, it will face few consequences. No entity has the authority to impose sanctions on that agency, and the fear that other states will retaliate by arbitrarily denying placements is far too speculative and remote because it has never occurred.<sup>47</sup> States deal with one another on a broad range of issues and the importance of this one issue likely ranks low on the list of priorities. The structure described above demonstrates the incentives for states to deny placements, which provide additional reasons why judicial oversight is crucial.

The most persuasive evidence justifying the need for judicial review lies in examining the results of a system—the interstate placement of foster children—which has operated without any such review for over forty years. Close scrutiny of this system demonstrates why judicial oversight must play a key role in any effort to reform the ICPC. The next section addresses this issue.

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<sup>47</sup> See NEW ICPC, *supra* note 5, at art. IV (stating there is a penalty available for illegal placement of children outside the ICPC, but no authority is given to penalize a receiving state agency's lack of due diligence or timeliness).

### III. THE EFFECTS OF UNBRIDLED AGENCY DECISION-MAKING

For the past forty years, the ICPC has prohibited any judicial oversight over the interstate placement of foster children.<sup>48</sup> Judges cannot compel another state to complete a home study,<sup>49</sup> expedite the completion of the assessment,<sup>50</sup> or place a child in the other state if the child welfare agency in the receiving state disapproves the placement, regardless of what others in the case believe is best for the child.<sup>51</sup> In this scheme, agencies have unfettered discretion to do as they please. No consequences occur if the agencies choose to exercise their authority in an erroneous or arbitrary manner.<sup>52</sup>

What has transpired in this system is precisely what one would expect in a system of voluntary compliance lacking any judicial oversight. The first step in the interstate placement process is that the sending state—the state proposing to place the child in another state—must request that the receiving state conduct a home study.<sup>53</sup> Although a juvenile court can order the sending state to submit a request for the home study, it has no authority to compel the other state to actually complete it.<sup>54</sup> Whether a state completes a home study and if so, how quickly it is done, is entirely up to the other state.<sup>55</sup> Voluntary guidelines drafted by the American Public Human Services Association, which administers the Compact, recommend that states complete home studies within thirty days.<sup>56</sup>

Timely home studies, however, are rarely completed. State Compact Administrators report that home studies routinely take at least three to four months to complete; others have reported that it takes between six months

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<sup>48</sup> Secretariat Opinion 43, *reprinted in* AMER. PUB. HUMAN SERVS. ASS'N, COMPACT ADMIN. MANUAL (Mar. 12, 1981) [hereinafter COMPACT ADMIN. MANUAL] (“[E]ven if the State A court disagrees with the determination of the receiving state Compact Administrator with respect to the making of a placement in the receiving state, the court does not have the jurisdiction or the power to act contrary to it.”).

<sup>49</sup> See NEW ICPC, *supra* note 5, at arts. III, IV, & IV; Secretariat Opinion 43, *supra* note 48.

<sup>50</sup> Secretariat Opinion 43, *reprinted in* COMPACT ADMIN. MANUAL, *supra* note 48.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 42 U.S.C. § 671(a)(26) (2006); GUIDE TO THE ICPC, *supra* note 7, at 6–7; *see also* Interstate Compact Replacement Request, ICPC-100A, *reprinted in* GUIDE TO THE ICPC, *supra* note 7, at 28–29.

<sup>54</sup> See NEW ICPC, *supra* note 5, at arts. III, IV, & V.

<sup>55</sup> *See id.*

<sup>56</sup> *See id.* at 7.

and a year, if not longer.<sup>57</sup> Recent findings from federally-mandated assessment reports corroborate anecdotal evidence. For example, 57% of interstate home studies requested by Arkansas were not completed within sixty days.<sup>58</sup> Of the home studies exceeding the time limit, approximately a quarter were completed within seventy-five days, while the remaining cases took longer.<sup>59</sup> Of those exceeding seventy-five days, the average time to completion was 110 days.<sup>60</sup> The greatest time to completion was 448 days.<sup>61</sup>

Arkansas fared no better in completing home studies requested by other states. Of the home studies completed by the state, 70% were not completed within sixty days.<sup>62</sup> Of the home studies exceeding the time limit, only 20% were done within seventy-five days.<sup>63</sup> Of those exceeding seventy-five days, the average time to completion was 176 days.<sup>64</sup> The longest home study took 558 days to complete.<sup>65</sup>

These findings are representative of those made by nearly every state assessing its interstate placement process. Fifty-five percent of home studies requested by Vermont took longer than three months.<sup>66</sup> Sixty

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<sup>57</sup> BRUCE BOYER, REPORT TO THE AMERICAN BAR ASSOCIATION 7 (2003), *available at* <http://www.abanet.org/leadership/2003/journal/118.pdf> (“As a result of all of the problems associated with the Compact, what should take days or weeks to accomplish often takes months or, at times, over a year while children wait in temporary out-of-home placements for the adults in charge of their futures to fulfill their professional obligations.”); *see also* OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: IMPLEMENTATION 6 (1999) (reporting that state Compact administrators wait an average of three to four months for the entire home study to be completed); A.A. v. Cleburne, 912 So. 2d 261 (Ala. Ct. App. 2005) (relying on information that a social worker’s belief that ICPC home study would take a minimum of nine months to complete); Libow, *supra* note 2, at 22 (observing that the ICPC approval process frequently takes between six months and a year and at times has exceeded one year).

<sup>58</sup> ARK. COURT IMPROVEMENT REPORT, *supra* note 3, at 27.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 47.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> VT. COURT IMPROVEMENT PROGRAM, VERMONT’S INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: AN ASSESSMENT OF THE COURT’S ROLE IN EXPEDITING THE  
(*continued*)

percent of home studies conducted by Alaska took over sixty days to finish.<sup>67</sup> Almost 40% of home studies requested by Maine took over three months.<sup>68</sup> The lengthy delays in the process have drawn the criticism of national child advocacy organizations, including the National Council of Juvenile and Family Court Judges, the American Bar Association, the National Association of Counsel for Children, and the American Academy of Adoption Attorneys.<sup>69</sup> Yet, because the Compact strips judges of the authority to compel child welfare agencies to complete interstate home studies in a timely manner,<sup>70</sup> only the benevolence of child welfare agencies can expedite the completion of home studies. The above data suggests that this has not occurred.

A second problem directly related to the lack of judicial oversight lies in the erroneous denial of home studies by receiving state agencies. Under the Compact, once a home study is completed, the child welfare agencies in the receiving state have the sole authority to determine whether to approve or deny a placement under a very subjective legal standard.<sup>71</sup> The Compact instructs agencies to reject a placement if the placement appears to be “contrary to the interests of the child.”<sup>72</sup> No formal assessment standards exist, and no distinction is made if the proposed placement is intended to be with a parent or a relative.<sup>73</sup> For all types of placements, the agency has broad authority to approve or reject placements with no judicial

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INTERSTATE PLACEMENT OF CHILDREN 7 (2008), *available at* [http://www.abanet.org/child/rcjji/placement\\_assessments/VT\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rcjji/placement_assessments/VT_icpc_assessment.pdf).

<sup>67</sup> ALASKA COURT SYSTEM, CINA ICPC ASSESSMENT 3 (2008), *available at* [http://www.abanet.org/child/rcjji/placement\\_assessments/AK\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rcjji/placement_assessments/AK_icpc_assessment.pdf).

<sup>68</sup> STATE OF MAINE, MAINE ASSESSMENT: INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 15 (2008), *available at* [http://www.abanet.org/child/rcjji/placement\\_assessments/ME\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rcjji/placement_assessments/ME_icpc_assessment.pdf).

<sup>69</sup> SUSAN LIVINGSTON SMITH, EVAN P. DONALDSON ADOPTION INSTITUTE, SAFEGUARDING INTERSTATE ADOPTIONS: THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (2005), *available at* [http://www.adoptioninstitute.org/publications/2005\\_Brief\\_Safeguarding\\_Interstate\\_Adoptions%20April.pdf](http://www.adoptioninstitute.org/publications/2005_Brief_Safeguarding_Interstate_Adoptions%20April.pdf); Vivek S. Sankaran, *Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys*, 27 A.B.A. CHILD L. PRAC. 33, 40 (2008).

<sup>70</sup> *See* NEW ICPC, *supra* note 5, at art. VI(B) (stating that an agency’s determination to deny placement “is not subject to judicial review”).

<sup>71</sup> *See supra* notes 48–57 and accompanying text.

<sup>72</sup> *See* NEW ICPC, *supra* note 5, at art. III(d).

<sup>73</sup> *Id.* at art. III(d).

oversight.<sup>74</sup> In many instances, judges are not even provided copies of the interstate home studies.<sup>75</sup>

Data suggest that agencies may be misusing this power. A high percentage of home studies are requested for placements of children with their parents and relatives—individuals whose relationship with the children receive some constitutional protection.<sup>76</sup> Yet a surprisingly large number of these interstate placement requests are rejected. For example, in Arkansas, approximately 50% of home study requests made to other states were denied.<sup>77</sup> Arkansas itself denied over 70% of the home studies it completed.<sup>78</sup> Similarly, Michigan denied 40% of all home studies it completed and its requests were denied in 50% of all cases.<sup>79</sup> Again, these statistics typify the practices of child welfare agencies across the country.

Data revealing the precise reasons for home study denials is not kept. Thus, it is impossible to know exactly why state agencies have used their unbridled discretion to reject such a significant number of placements of children with their out-of-state parents and relatives. However, anecdotal evidence reported by advocates across the country reveals a disturbing pattern of arbitrary decision-making.<sup>80</sup> For example, a birth mother in Alabama was rejected as a placement for her child because she was in a relationship with a man who had a criminal conviction seventeen years prior.<sup>81</sup> A father in Texas was deprived of the opportunity to raise his child because of his conviction for armed robbery fifteen years prior.<sup>82</sup> Spanish-speaking relatives of a child were denied the ability to care for children because they refused to participate in parenting classes, which were only

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<sup>74</sup> See *supra* notes 48–57 and accompanying text.

<sup>75</sup> See ARK. COURT IMPROVEMENT REPORT, *supra* note 3, at 42 (reporting that 55% of judges never received ICPC home study reports); see also ADMINISTRATIVE OFFICE OF THE COURTS, CALIFORNIA'S INTERSTATE COMPACT FOR THE PLACEMENT OF CHILDREN (ICPC) ASSESSMENT 3 (2008), available at [http://www.abanet.org/child/rcjji/placement\\_assessments/CA\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rcjji/placement_assessments/CA_icpc_assessment.pdf) (noting that judges frequently felt limited by their lack of information in ICPC cases).

<sup>76</sup> See *supra* notes 41–44 and accompanying text.

<sup>77</sup> ARK. COURT IMPROVEMENT REPORT, *supra* note 3, at 27.

<sup>78</sup> *Id.* at 47.

<sup>79</sup> See STATE COURT ADMINISTRATIVE OFFICE, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: MICHIGAN ASSESSMENT 33 (2008), available at [http://www.abanet.org/child/rcjji/placement\\_assessments/MI\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rcjji/placement_assessments/MI_icpc_assessment.pdf).

<sup>80</sup> These accounts are documented in emails on file with the author.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

offered in English.<sup>83</sup> Denials in other cases have been based on subjective determinations, such as a lack of acceptable parenting skills, inadequate living space, or insufficient income.<sup>84</sup> Often these decisions are made by a lone caseworker with few years of child welfare experience and whose decision is not closely scrutinized by others at the agency.<sup>85</sup> Few, if any, states have established administrative processes to challenge erroneous decision-making.<sup>86</sup>

In these and other cases, the child welfare agency in the receiving state denied the proposed placement, despite a consensus among the parties and the court in the sending state that the placement was in the child's best interest. Again, the underlying reason for the high rate of denials is unknown. Agencies may deny interstate home studies to prevent other states from "dumping" foster children in their state. Agencies may simply be overwhelmed and deny placements because they do not have the time to conduct thorough investigations. Without any judicial oversight, there is no legal mechanism to prevent agency overreaching. Lacking the authority to examine the reasons behind the denials and to place children over the objection of the receiving state, judges can only move the case forward by

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<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *In re Emmanuel R.*, 114 Cal. Rptr. 2d 320, 323 (Cal. Ct. App. 2001) (contending that the placement request was denied based on "criminal record" and "past history" with child welfare authorities); *Dep't of Servs. for Children v. J.W.*, No. CK96-04055, 2004 Del. Fam. Ct. LEXIS, at \*142 (2004) (arguing that the denial was primarily based on the fact that the father had more than two misdemeanor convictions); *Adoption of Leland*, 842 N.E.2d 962, 966 (Mass. App. Ct. 2006) (discussing that the home study of a father was denied because too many people lived in the home); *Div. of Youth & Fam. Servs. v. K.F.*, 803 A.2d 721, 725 (N.J. Super. Ct. App. Div. 2002) (contending that the denial was based in part on the fact that the prior home was "cramped, cluttered and dirty" even though the current residence met all of the relevant state standards).

<sup>85</sup> See *Out of Luck*, *supra* note 2, at 66–67 (2006); see also *Perpetuating Impermanence*, *supra* note 2, at 444.

<sup>86</sup> See, e.g., ASSESSMENT OF LEGAL ISSUES AND COURT PROCEEDINGS IN INDIANA INVOLVING OUT OF STATE PLACEMENTS 23 (June 2008), available at [http://www.abanet.org/child/rclji/placement\\_assessments/IN\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rclji/placement_assessments/IN_icpc_assessment.pdf) (acknowledging that there is no formal appeal process for ICPC denials); INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: MICHIGAN ASSESSMENT, *supra* note 79, at 15 (recommending that Michigan adopt an appeals process for ICPC denials); N. DIANE GOUT & ANITA ST. ONGE, MASSACHUSETTS ASSESSMENT OF EFFORTS RELATED TO THE INTERSTATE PLACEMENT OF CHILDREN 21 (2008), available at [http://www.abanet.org/child/rclji/placement\\_assessments/MA\\_icpc\\_assessment.pdf](http://www.abanet.org/child/rclji/placement_assessments/MA_icpc_assessment.pdf) (recommending the creation of a process to appeal ICPC denials).

trying to locate alternate placements for these children. Until then, the children often remain in foster care indefinitely.

The experience over the past forty years demonstrates the need for judicial oversight over the interstate placement process. Home studies are not completed in a timely manner. Placements are denied at an astonishingly high rate and for subjective reasons. No administrative processes have been created to review poor agency decision-making, and litigants have no avenues to prevent agency overreaching because court review is prohibited. The next section presents an outline as to how judicial oversight over the interstate placement of foster children can be instituted and recommends that these reforms be implemented through federal legislation because states have refused to address these problems.

#### IV. THE IMPLEMENTATION OF JUDICIAL OVERSIGHT

A relatively straightforward proposal creating judicial oversight would address the problems noted above while balancing a child's interest in promptly resolving placement decisions with the need to access important information about the proposed placement to make a considered decision.<sup>87</sup> Under the reformed system, the child welfare agency in the sending state would bear the responsibility of ensuring that private or public child welfare agencies complete interstate home studies within thirty days of a request.<sup>88</sup> Courts in the sending state would retain the sole authority to make interstate placement decisions.<sup>89</sup> Finally, if an interstate placement is made, agencies in the sending state would have to arrange for a private or public child welfare agency to monitor the placement.<sup>90</sup> As is currently the case under the Compact, the sending state would continue to maintain full financial responsibility for the child and any services the child received after the placement was made.<sup>91</sup>

In practice, the system would work in the following way. When an out-of-state placement is proposed for a child, the sending state would be required to immediately arrange and pay for a home study to be completed by either a private or public child welfare agency in the receiving state

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<sup>87</sup> A similar version of this reform proposal first appeared in *Perpetuating Impermanence*, *supra* note 2, at 457.

<sup>88</sup> *Id.* at 458.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> See NEW ICPC, *supra* note 5, at art. V ("The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement.").

within thirty days of the request. The American Public Human Services Association and federal law have endorsed a thirty-day time period as the benchmark for how quickly home studies should be completed.<sup>92</sup> The home study must ascertain objective facts about the proposed caregiver and his or her living situation similar to facts required in intrastate home studies. For example, specific information about the caretaker's home, past relationship with the child, criminal record, and any child protective history would be particularly relevant. The caseworker conducting the evaluation should include a statement about whether the potential placement would violate any laws in the receiving state and may include a recommendation about whether the placement would serve the child's best interests.

Once completed, the home study would be transmitted to the court in the sending state for a decision about whether the placement should be made. The sending state court would retain the sole authority to decide whether the child should be placed with the proposed caregiver unless the placement would violate the child placement laws in the receiving state. The procedures for making this decision would mirror those for intrastate placement decisions, except the receiving state agency would be provided notice of the hearing and an opportunity to be heard prior to the decision.<sup>93</sup> The caseworker who drafted the home study could testify in the proceeding by telephone if necessary.<sup>94</sup> The court would issue its decision after considering the home study, any additional evidence, and arguments by the

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<sup>92</sup> See GUIDE TO THE ICPC, *supra* note 7, at 5 (recommending that the ICPC requests be processed within 30 days); see also 42 U.S.C. § 673(g)(3) (2006) (defining a timely home study as one completed within thirty days).

<sup>93</sup> See AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, ICPC DEVELOPMENT AND DRAFTING TEAM FIRST MEETING SUMMARY 8 (July 2004) (discussing how members of the ICPC Development and Drafting Team recommended that judges be empowered with the ultimate authority to make interstate placement decisions, even over the receiving state's objection. "[I]t was the general consensus that the judge in the sending state should be able to override a recommendation by the receiving state with regard to safety and suitability of a placement based on the best interests of the child. The judge should also be able to rule that an out-of-state parent is fit, and to close the case. However, the receiving state should have a right to be heard in the case if the judge places the child in their state and intends to keep the case open.").

<sup>94</sup> The Uniform Child Custody and Jurisdiction Enforcement Act, which has been adopted by over forty states, specifically authorizes courts to take testimony of out-of-state witnesses by telephone. See, e.g., MICH. COMP. LAWS ANN. § 722.1111 (West 2002); N.C. GEN. STAT. ANN. § 50A-111 (West 2007); R.I. GEN. LAWS § 15-14.1-11 (2003).

parties and the receiving state. Any party to the child protective proceeding and the receiving state aggrieved with the court's placement decision would have standing to appeal the decision in any manner authorized by the law in the sending state.

If the sending state agency failed to arrange for the completion of the home study within thirty days, then the individuals affected by the noncompliance, including the child and the proposed caretaker, would have standing to seek a judicial remedy in the sending state.<sup>95</sup> Possible compliance mechanisms could include a contempt finding, financial penalties, or orders to reimburse private agencies to complete home studies. Another form of equitable relief could include ordering the interstate placement without a home study if the court possesses enough information to make a determination about the placement of the child.<sup>96</sup>

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<sup>95</sup> See Freundlich, *supra* note 2, at 51–52. Freundlich suggested that one approach to enforce the ICPC would be to give standing to the child's foster parents, attorney, and/or guardian *ad litem* in the sending state and to the prospective adoptive parent(s) in the receiving state to file an action against the public child welfare agency in the receiving state when there is inaction or administrative mismanagement. *Id.* at 52. “[T]he knowledge that there is legal recourse on behalf of waiting children would create an additional incentive for timely and quality determinations.” *Id.*

<sup>96</sup> The ultimate responsibility of dependency courts is to protect the best interests of the child. As such, a number of courts have overlooked violations of the ICPC when the best interests of the child warrant such a result. See, e.g., *In re Christina M.*, 43 Cal. Rptr. 2d 52, 56 (Cal. Ct. App. 1995) (“We do not believe the Compact was meant to be applied so inflexibly that emergency moves cannot be accommodated. The juvenile court has broad discretion to decide what means will best serve the child's interest and to fashion a dispositional order accordingly.”) (internal quotation omitted); *In re Adoption/Guardianship No. 3598*, 701 A.2d 110, 124 (Md. 1997) (“Certainly, the best interest of the child remains the overarching consideration and the needs of the child should not be subordinate to enforcement of the ICPC.”); *State v. K.F.*, 803 A.2d 721, 729 (N.J. Super. Ct. App. Div. 2002) (“To view the ICPC as a set of rigid rules would circumvent its goals and the court's ability to achieve those goals. The court's paramount duty in child welfare cases is to protect the best interest of the children.”); *Florida v. Thornton*, 396 S.E.2d 475, 481–82 (W. Va. 1990) (“[W]e certainly do not mean to denigrate the ICPC or its importance. We merely recognize that when the facts of a case . . . compel the exercise of our *parens patriae* duty to protect a child's best interests, that duty outweighs the competing interests of abiding by a strict and uncompromising reverence to the Compact . . .”). *But see* *In the Matter of Ryan R.*, 29 A.D.3d 806 (N.Y. App. Div. 2006) (reversing placement order which sent children to their paternal aunt and uncle in violation of the ICPC); *In the Matter of Melinda D.*, 31 A.D.3d 24, 32 (N.Y. App. Div. 2006) (“Well-intentioned efforts of law guardians, placement agencies, and courts to match children with suitable foster care,  
(continued)

This last remedy may be applicable in many situations due to the ease at which information relevant to evaluating a caretaker's parenting abilities, such as previous criminal or child protective history, can be obtained electronically.<sup>97</sup> Testimony by the potential caretakers at a placement hearing conducted in the sending state could also yield enough information to satisfy concerns the court may have regarding the placement.<sup>98</sup>

After the placement is made, the sending state agency would arrange for a private or public child welfare agency to monitor the placement and provide periodic reports to the court with updates on the child's status. As in the current system, the sending state would retain financial responsibility for the child at all times prior to the closing of the case. The child's need for expedited decisions about his permanency would trump bureaucratic or financial obstacles created by state agencies.

States may resist this proposal for several reasons. It eliminates the complete control that state agencies exercise over interstate placement decisions. Under the ICPC, the local agency in the receiving state possesses the exclusive authority to determine whether the child can be placed in that state. Courts have been divested of any such authority. The new reforms would strip the agency of that power and instead invest sending state courts with the power to control placement decisions. Although the proposal entitles the receiving state to notice and an opportunity to be heard prior to the placement decision being made, the agency would no longer control the process. However, as explained in the first two sections of this paper, compelling reasons exist to transfer decision-making authority from child welfare agencies to state courts.

Child welfare agencies may also claim that vesting decision-making power with sending state courts would infringe upon the sovereignty of the receiving state. The argument would be based on the notion that the sending state court does not have jurisdiction to compel the receiving state

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particularly for children whose placements are rendered more difficult by virtue of special needs, must nevertheless comply with the procedural mandates of [the ICPC] to fully protect the best interests of foster children.”).

<sup>97</sup> See *Crystal A. v. Lisa B.*, 818 N.Y.S.2d 443, 445 (N.Y. Sup. Ct. 2006) (“Today, so many records are computerized and the local New York State agency through computer searches and telephone interviews can obtain almost as much information about the interested relatives as the out-of-state agencies located where the relatives reside.”).

<sup>98</sup> See *id.* (“[T]he maternal grandfather and his wife traveled to present themselves to this Court, voluntarily testified before the Court and subjected themselves to cross-examination. All parties had an opportunity to judge the maternal grandfather's and his wife's credibility and character in person.”).

agency to take any action. This concern, however, is misplaced because under the proposal, the sending state court would not be issuing orders that bind the receiving state agency in any way. Throughout the entire process, the sending state would be responsible for the child's placement and the court would only be issuing orders that compel the sending state agency to take certain steps. The sending state agency would bear the responsibility of arranging for the timely completion of the home study. If an interstate placement was made pursuant to a court order, the order would simply require the sending state agency to place the child with a caretaker in another state. The interstate placement would be consistent with federal law, which mandates the elimination of barriers to inter-jurisdictional placements,<sup>99</sup> and the Constitution, which protects individuals' right to travel.<sup>100</sup> The complete financial responsibility for the child would remain with the sending state unless the two states reached a separate agreement.<sup>101</sup> If they did not reach such an agreement, the sending state would retain full financial responsibility for the child's maintenance. The sending state court would not impose any additional obligations on the receiving state agency.

Finally, child welfare agencies may argue that the proper solution to this problem is to afford aggrieved caretakers an administrative hearing in the receiving state rather than provide courts with the authority to make the final decision. This solution is impractical for many reasons. First, relying on administrative hearings in the receiving state would place the burden on the caretakers to address erroneous denials because all the parties in the case, including the child's advocate, would be in the sending state. These

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<sup>99</sup> See, e.g., Safe and Timely Interstate Placement of Foster Children Act of 2006 § 10, 42 U.S.C. § 671(a)(15)(C) (2006) (advocating for interstate child placements where doing so is in the best interests of the child); Keeping Children and Families Safe Act of 2003 § 204, 42 U.S.C. § 5114 (mandating findings assessing interjurisdictional child placements and recommendations for future reform).

<sup>100</sup> See, e.g., *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."); *United States v. Guest*, 383 U.S. 745, 759 (1966) ("Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists.").

<sup>101</sup> See NEW ICPC, *supra* note 5, at art. V ("When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agency for the sending agency.").

caretakers would likely lack representation and the sophistication necessary to navigate a complex system without a lawyer. This would create a high likelihood that erroneous denials would go unchallenged. If the decision rested with the sending state court, then a number of parties, most of whom would be represented by attorneys, could bring the issue to the court's attention and fully litigate it.

Second, the administrative hearing process would add considerable delays to finalizing a permanent placement for the child due to the length of time it typically takes to obtain a hearing and decision. For example, under most state administrative procedures acts, no specific timeframes exist as to how quickly hearings must be held.<sup>102</sup> As a practical matter, evidence suggests that it takes several months to get an administrative hearing, if not longer.<sup>103</sup> After the administrative decision is made, that decision could be appealed to a trial court, whose decision could be appealed to appellate courts.<sup>104</sup> Thus, if this process was adopted to review interstate placement denials, then a child would remain in limbo for months, not knowing whether he or she was going to live with the caregiver in another state or move elsewhere. In contrast, courts have the flexibility to convene emergency hearings at any point to address immediate problems that arise in a child protective case, and thus, could resolve the placement issue in an expeditious and efficient matter.

Finally, reliance on an administrative process in the receiving state would significantly increase the chance of a poor, incomplete placement decision. Any placement decision in a child welfare case involves a balancing of harms. The decision-maker must compare the strengths and

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<sup>102</sup> See, e.g., MINN. STAT. ANN. § 14.51 (West 2005) (imposing no timing requirements on a judge for the scheduling of an administrative hearing); N.Y. A. P. A. § 301 (McKinney 2003) (requiring only that administrative hearings occur within a reasonable time period); TEX. GOV'T CODE ANN. § 2001.051 (Vernon 2008) (setting no specific time for the scheduling of an administrative hearing by the administrative judge).

<sup>103</sup> See, e.g., Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 151 (1990) (highlighting the delays that accompany the general administrative hearing and judicial review process); Ann Wise, *Louisiana's Division of Administrative Law: An Independent Administrative Hearings Tribunal*, 68 LA. L. REV. 1169, 1196-97 (2008) (discussing the delays that can accompany the scheduling of an administrative hearing).

<sup>104</sup> A number of states provide for judicial review over administrative court decisions. See, e.g., FLA. STAT. ANN. § 120.68 (West 2008); MD. CODE ANN., STATE GOV'T § 10-222 (LexisNexis 2008); MINN. STAT. ANN. § 14.69 (West 2005); N.D. CENT. CODE § 28-32-46 (2001); TEX. GOV'T CODE ANN. § 2001.171 (Vernon 2008).

weaknesses of the proposed placement with the child's current living situation. For example, the decision of whether to place a child in another state could depend on the child's living situation in the sending state, his or her special needs, the prospects of reunification, and countless other factors. To formulate an accurate determination, the decision-maker needs comprehensive information about the child from both states.

An administrative hearing process in the receiving state would not be conducive to this type of reasoned deliberation. The administrative hearing officer would be new to the case and know nothing about the child. Thus, to assess whether the placement should be made, the officer has to attain the same level of understanding of the case as the sending state juvenile court judge. Most, if not all, of the parties with substantive knowledge of the child's life, however, would be in the sending state. This would include the child's parents, social worker, guardian *ad litem*, and other service providers. These actors may lack standing to appear and participate in the administrative hearing. Even if that issue was resolved, logistical impediments, including the distance between the two forums, would make it difficult for them to effectively participate in the hearing and educate the hearing officer about the different considerations that must be taken into account. The hearing officer would likely base his or her decision on limited facts presented by the receiving state caseworker and the *pro se* caretaker.

These problems would be avoided if decision-making rested with the sending state court judge, who, as the judge responsible for the child's case, already possesses a comprehensive understanding of the child's situation. The only information the judge would need to make a placement decision would be the home study completed by the caseworker in the receiving state, along with the testimony of the caretaker who may wish to dispute findings in the home study. With this limited information, the judge would be in the best position to balance the harms implicated by the potential placement. Retaining the authority to make placement decisions with the juvenile judge in the sending state eliminates the need to educate another fact-finder about the complex dynamics in the child's life, which for the aforementioned reasons is unlikely to happen if the decision rests with an administrative hearing officer in the receiving state.

## V. CONCLUSION

Implementing judicial oversight over the interstate placement process is the only way to insure that the interests of children to remain with their families are prioritized, which unfortunately has not occurred in the current system. The failure of states to remedy this problem over the past forty

years and the inadequacy of their current proposal to reform the Compact suggest that federal intervention is necessary. Such intervention would be consistent with the federal government's interests in addressing problems of a national scope beyond the capacity of individual states to solve. It would also serve the government's interest in expediting the permanency of foster children, which has already resulted in numerous federal mandates on state child welfare systems. The increasing numbers of interstate placement requests only underscores the need for immediate reform.