DEPARTMENT OF JUSTICE
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JAN 22 1991
DEPT. OF JUSTICE

DATE: January 16, 1991

SUBJECT: Child Support Enforcement; proposed legislation pursuant to federal requirement in Family Support Act of 1988; Section 101 of Title IV-D of the Social Security Act providing for immediate wage withholding.

REQUESTED BY: Deb Thomas, Director
Nebraska Department of Social Services

WRITTEN BY: Don Stenberg, Attorney General
Royce N. Harper, Senior Assistant Attorney General

QUESTION: The Family Support Act of 1988 amended various sections of Title IV-D of the Social Security Act. The amendment to Section 101 of Title IV-D of the Social Security Act provided for immediate withholding (of income) with certain exceptions, in the case of support orders issued or modified on or after November 1, 1990 as to cases being enforced under Title IV-D program procedures. Section 101 requires states to enact laws and implement procedures for immediate withholding in all IV-D cases.

The question is whether proposed legislation, intended to enact a law to implement the federal requirement as to IV-D cases only would be in violation of the ruling by the Nebraska Supreme Court in Drennan v. Drennan, 229 Neb. 204, 426 N.W.2d 252 (1988) which opinion addressed the matter of equal protection.

CONCLUSION: Yes. Based on the opinion in Drennan, we believe such legislation would be unconstitutional.

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In Drennan the court addresses the constitutionality of the Referee Act in terms of its potential violation of the equal protection clause of the Nebraska Constitution (Art. 1, Sec. 13 and Art. III, Section 18).

The Court in Drennan viewed equal protection clause questions as involving a rational basis test. Is there a rational basis for the state's classification? In other words, as the test related to Drennan, was that a "rational basis for treating IV-D cases differently than non-IV-D cases?"

> The Legislature may make a reasonable classification of persons, corporations, and property for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class relative to the subject of legislation which render appropriate its enactment.

Id. at 217, quoting from State ex rel. Rogers v. Swanson, 192 Neb. 125, 219 N.W.2d, 726 (1974).

The legislature, in compliance with the court's holding in Rogers, may treat IV-D cases differently than non-IV-D cases as long as that difference in treatment is based on real differences that exist between the two groups. Simply stated, there are only two groups for classification: (1) the IV-D cases which include those that have received ADC (Aid to Dependent Children) payments and those cases where the mothers registered and paid a nominal fee for the services and (2) the non-IV-D where the mothers did not know they could register and get the service or where they were financially able to hire private counsel to pursue collection.

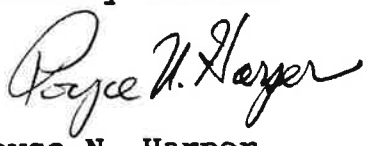
In Drennan, the chief reason the court found the statutes in question to be unconstitutional involved the unreasonableness of the classification employed by the state. One group of children received the help in the enforcement of child support and another group did not.

The classification was found to be unconstitutional because it failed to achieve its stated purpose. There appeared to be no rational relationship between the goal to be achieved by the legislation and the means used to achieve those goals. "That effort does not in any way assist children who need assistance but who are not receiving state or federal aid." Id. at 219.

It is our opinion that any legislation which would provide for immediate withholding of income for IV-D cases only would be denying an expedited service to those children (and their caretaker) who are not receiving any state or federal aid. A separate classification of the two groups with separate treatment would not rest upon real differences. Based on the rationale in Drennan it would be violating the equal protection clause and would, therefore, be unconstitutional.

Sincerely,

DON STENBERG
Attorney General



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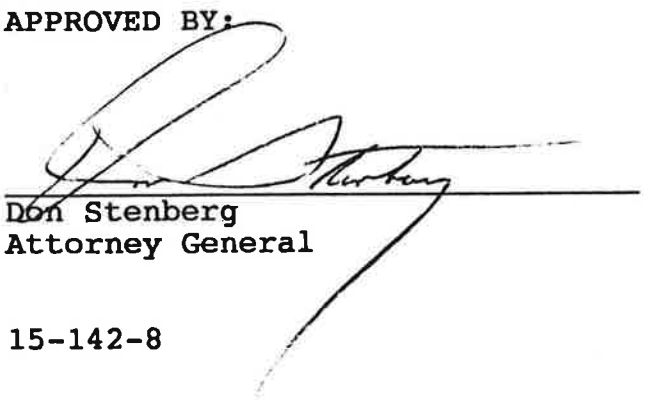

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