STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

#95091

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

NO
STATE OF NEBRASKA
OFFICIAL
DEC 1 1995
DEPT. OF JUSTICE

DATE: November 27, 1995

SUBJECT: Inmate/Student Transportation

REQUESTED BY: Harold W. Clarke, Director, Nebraska Department of Correctional Services

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have asked several questions regarding the transportation of inmates and/or students in the control of the Department of Correctional Services. We will attempt to answer each of these questions individually.

You first ask when, in accordance with state law, the Department of Correctional services is obligated to transport inmates/students to a court appearance. Generally, state statutes do not address the transportation of inmates. Neb. Rev. Stat. § 29-3804 (1989) does address the delivery of inmates to a city or county in which an untried indictment, information, or complaint is pending against an individual who is currently a prisoner imprisoned in a facility operated by the Department of Correctional Services. The statute states in relevant part:

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> Upon receipt of the prosecutor's written request the director shall: . . . (2) offer to deliver temporary custody of the prisoner to the appropriate authority in the city or county where the untried indictment, information, or complaint is pending in order that speedy and efficient prosecution may be had.

Also, Neb. Rev. Stat. § 25-1233 (1989) states: "A person confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned." Implicit in this is that the authority having the individual in its custody shall produce the inmate unless the court order provides for another means of delivery of the inmate.

You next ask if the Department of Correctional Services is obligated under state law to supervise inmates/students transported to a court appearance, and if so, under what conditions. The statutes cited above provide that, upon receipt of the prosecutor's written request the Director of Corrections shall offer to deliver the temporary custody of the prisoner (§ 29-3804) or that the prisoner shall be required to be produced (§ 25-1233). The statutes do not address actual transportation of the inmate but, in the absence of other provisions the statutes imply the actual delivery of the prisoner by the authority having custody. However, state statutes do not address provision of security during a court appearance. Since the sentencing court has given custody of the inmate/student to the Department of Correctional Services, the department would be responsible for supervision of the inmate/student until the individual has completed his or her sentence or until such time as custody is transferred to another, appropriate authority. The Department of Correctional Services is obligated to supervise all inmates in their custody pursuant to Neb. Rev. Stat. § 29-3804. Therefore, unless the court orders otherwise or other arrangements are made, the department must provide supervision of the inmate/student.

You next ask when, in accordance with state law, the Department of Correctional Services may transport an inmate/student to a court appearance. You ask if the Department of Correctional Services may transport an inmate/student to a court appearance without a court order if the appearance arises out of the inmate's/student's incarceration. You also ask whether the

Department of Correctional Services needs to have a court order to transport an inmate/student to his or her own trial in a Federal or State civil rights action naming employees of the Department of Correctional Services as defendants.

The Nebraska statutes address only the required production of an inmate and do not address when the production or transportation of an inmate may be discretionary by the Department of Correctional Services. Transportation of an inmate to a court appearance without a court order, outside of the provisions of Section 29-3804, is discretionary with the department. The department does not need to have a court order in order to transport an inmate to his or her own trial. However, any transportation of an inmate outside the institution involves a certain amount of risk to security. Thus, for security reasons, the department may refuse to transport an inmate/student to court in the absence of a court order. Security should be a primary concern of the department in making any decisions to transport inmates at any time.

You next ask when the Department of Correctional Services is obligated to release an inmate/student to the custody of law enforcement authorities for transportation and supervision for a court appearance. Because the department has the legal obligation to supervise the inmate/student during the period established by the court, the inmate/student should not be released to another authority without a court order or other proper authorization transferring supervision of the inmate/student. A court order directing other law enforcement authorities to transport and supervise an inmate should be regarded as a proper transfer of supervision. If the department has security concerns regarding the transportation of the inmate, these concerns should be brought to the attention of the transporting authority as well as the court.

You next ask whether the Department of Correctional Services should require that county prosecutors file detainers to secure an inmate's/student's presence for his or her own trial in a criminal case. You also ask if the department's legal obligation changes if a case involves a crime committed in prison. Neb. Rev. Stat. § 29-3804 states that upon written request the prosecutor in a city or county shall be entitled to have a prisoner, against whom he or she has lodged a detainer and is serving a term of imprisonment in a facility operated by the department, be made available. Thus, by statute, the department is only obligated to transport an inmate if a detainer has been filed against him or the court has issued an

enforceable order. To require that the prosecutor file such a detainer would be in compliance with the statutes and, as such, would provide additional protection for the department in the transportation and transfer of the inmate. This would apply whether the crime was committed within the prison setting or outside of the prison setting.

You next ask when the Department of Correctional Services should require that a Writ of Habeas Corpus Ad Testificandum be obtained. A Writ of Habeas Corpus Ad Testificandum is directed to the individual who has custody of an inmate directing that the inmate be produced for testimony. The court may also utilize an Order to Transport directed toward the department or warden of a facility directing the delivery of the inmate. Thus, the department need not require that a Writ of Habeas Corpus Ad Testificandum be obtained in all cases where an inmate's testimony is sought, but should request at least that an Order to Transport be issued by the court prior to the delivery of an inmate to the court setting.

You next ask if the Director of the Department of Correctional Services has authority (statutory or otherwise) to negotiate a procedure with one county to secure the presence of inmates/students at a court appearance which varies from the statutory scheme. If such a procedure is negotiated, you inquire whether all counties need to be treated according to the terms of the agreement negotiated.

The Director of Correctional Services does not have authority to act contrary to the statutes of the State of Nebraska. However, in regard to the presence of inmates at a court appearance, the only statutory mandate is that the director offer to deliver inmates for temporary custody to appropriate authorities in cases relating to untried indictments, informations, or complaints. Neb. Rev. Stat. § 29-3804. And that, upon court order, the inmate be produced for oral examination in the county in which he is incarcerated. Neb. Rev. Stat. § 25-1233.

The Inter-Governmental Cooperation Act, Neb. Rev. Stat. §§ 13-801 through 827 (1991) permits public agencies to work together on a basis of mutual advantage. State agencies are included in the definition of public agencies. These statutes would permit the Director of the Department of Correctional Services to work out an agreement with city, county, state, or federal authorities

regarding the delivery and supervision of prisoners. Since the court has given custody of the prisoner to the Department of Correctional Services, sound judgment should be used in determining the qualification of others to transport or supervise inmates/students. In the case of an escape or criminal activity on the part of the prisoner, the courts would look to the department as custodian of the individual and might question whether the transfer of custody to another entity was reasonable. Because an agreement is negotiated with one entity, whether city, county, state, or federal, it would not be necessary to negotiate the same agreement with all other governmental entities. The Inter-Governmental Cooperation Act states that the basis of the agreement is mutual advantage. While it may be advantageous to arrange such an agreement with one public entity, the advantage may not exist for other governmental entities.

Your final question is whether, when the Department of Correctional Services receives ex parte orders to transport inmates/students to juvenile court, workers compensation court, district court (for either a civil case or a criminal matter not involving the Department of Correctional Services), the law requires that the court issuing the order obtain jurisdiction over the Department of Correctional Services and/or a named employee of the department. We are unsure of what your question is in this matter. Certainly, a court must have jurisdiction of the entity over which it seeks to exercise its authority in order to enforce the order or to impose sanctions for failure to comply with the order. If your question is whether the court must make the department a party in the suit in order to enforce an order to transport, the answer is no. The order to transport a prisoner, usually in the form of a Writ of Habeas Corpus ad Testificandum, would be similar to a subpoena issued to a witness in order to obtain the witness's presence at a hearing. It is not necessary to make a witness a party to the suit in order to enforce his or her attendance at a hearing. In issuing an order to transport a prisoner, the court should issue the order to the person having custody of the prisoner. Generally this would be the Warden or Superintendent of a facility.

Neb. Rev. Stat. § 25-1233 (1989) states that a person confined in any prison in the state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned. The statute further states that in all other cases his examination must be by deposition. Therefore, any juvenile

court, workers compensation court, district court, or other court of record may order that an inmate be produced for oral examination in the county of incarceration in either a civil or criminal matter whether or not it involves the Department of Correctional Services. If such an order is issued, the Department of Correctional Services would be under an obligation to produce the individual. However, if the individual is incarcerated in a county other than that in which the court is sitting, pursuant Neb. Rev. Stat. § 25-1233, the examination must be by deposition. If the inmate's presence is ordered for testimony in a county other than that in which the inmate is incarcerated, the department should object. Such an order would be in conflict with the statutes.

Section 25-1233 clearly states that such testimony must be by deposition. While the term "must" has been interpreted by the court as both permissive and mandatory, the entire statute must be reviewed in order to determine its intent. In ***Hartman v. Glenwood Tel. Membership Corp.***, 197 Neb. 359, 249 N.W.2d 468 (1977), the Nebraska Supreme Court analyzed the mandatory versus directory intent of statutory wording. The Court cited to ***1 Am.Jur.2d, Administrative Law***, § 46, p. 847, for the principle that "those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory. . . " ***Id.*** at 371, 249 N.W.2d at 475. Section 25-1233 is addressed to the examination and deposition of prisoners. The requirement addressed to when a prisoner's testimony is being sought outside of the county in which he is imprisoned relates to the very essence of the statute itself. Therefore, "must" should be read as mandatory and not merely directory.

While there is no Nebraska case law or statute on the court's authority to require the presence of a prisoner in civil cases in which the prisoner is a party, clearly the court's authority would not be greater than its authority to require attendance of a witness. The court must have jurisdiction of the entity having custody of the inmate before it can compel that the prisoner be produced.

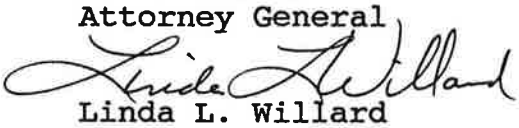
The Nebraska Supreme Court has upheld a court's determination that an inmate-party need not be produced in a civil action. ***See In re Interest of L.V.***, 240 Neb. 404, 482 N.W.2d 250 (1992); ***Wilson***

v. Wilson, 238 Neb. 219, 469 N.W.2d 750 (1991); ***Caynor v. Caynor***, 213 Neb. 143, 327 N.W.2d 633 (1982). The presence of the inmate is left to the discretion of the court. Similarly, the federal courts have determined that, before ordering the presence of an inmate-party in a civil case, the court weigh "the interest of the person against the interest of the state in maintaining the confinement of the plaintiff-prisoner." ***Stone v. Morris***, 546 F.2d 730, 735 (7th Cir. 1976). ***See, also, Holt v. Pitts***, 619 F.2d 558 (6th Cir. 1980).

In those cases involving a criminal action against the inmate/student, Neb. Rev. Stat. § 29-3804 would apply. In such a case, upon order of any court before which criminal charges are pending or upon written request of the prosecutor who has filed a detainer against the inmate, the director of correctional services shall offer to deliver custody wherever within the state the charges are pending. Neb. Rev. Stat. §§ 29-3201 through 3210 (1989) sets out the Uniform Rendition of Prisoners and Witnesses in Criminal Proceedings Act and would govern when an inmate in custody of the Nebraska Department of Correctional Services is being summoned to appear as a witness in a criminal proceeding in another state.

Sincerely,

DON STENBERG
Attorney General



Linda L. Willard
Assistant Attorney General

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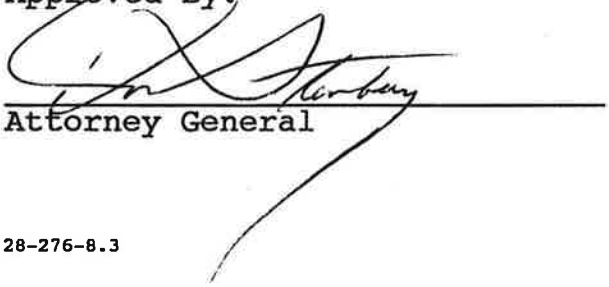

Attorney General

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