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

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#94050

STATE OF NEBRASKA
OFFICIAL
JUN 29 1994
DEPT. OF JUSTICE

DATE: June 24, 1994

SUBJECT: LB 1351 - Constitutionality of Sanctioning Parent for Crimes of Child

REQUESTED BY: Senator Eric J. Will

WRITTEN BY: Don Stenberg, Attorney General
Barry Waid, Assistant Attorney General

The act embodied in LB 1351 appears to be an attempt to make parents take more responsibility for the activities of their minor children. The ultimate goal of the legislation would appear to be aimed at discouraging various forms of undesirable conduct on the part of children. The major portion of the proposed legislation seeks to do this by requiring parents of children who have gotten into trouble to avail themselves of public or private child service organizations.

The U.S. Supreme Court has repeatedly held that the state and federal governments cannot deprive citizens of life, liberty, or property without due process of law. ***Meyer v. Nebraska***, 262 U.S. 390 (1923). The due process clause provides both procedural and substantive due process protections. ***Pierce v. Society of Sisters***, 268 U.S. 510 (1925). Both ***Meyer*** and ***Pierce*** involve state statutes that interfered with the ability of parents to choose how to best educate their children. In ***Meyer***, the U.S. Supreme Court found that the Fifth and Fourteenth amendments' guarantee that citizens would not be deprived of liberty without due process and that liberty includes the right to raise one's children. ***Meyer v. Nebraska, supra*** at 399 (educating children in a foreign language). In ***Pierce***, the Court found that the "liberty of parents and guardians to direct the upbringing and education of children under their control" denied the state the power to force children to attend public schools. ***Pierce v. Society of Sisters, supra.***

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Lisa L. Cabral
Laurie Smith Camp
Delores N. Coe-Barbee
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper
Mary L. Hewitt
Lauren Lee Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Donald A. Kohtz
Joseph P. Loudon
Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne
Paul N. Potadle
James H. Spears
Mark D. Starr
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard
Printed with soy ink on recycled paper

On the other hand, the state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized. ***Parham v. J.R.***, 442 U.S. 584, 61 L.Ed.2d 101, 99 S.Ct. 2493 (1979). The family is not beyond regulation by the state in the public interest and the rights of parenthood are not beyond limitation. ***Prince v. Commonwealth of Massachusetts***, 321 U.S. 158 at 166 (1944). The state as parens patriae and within the police powers of the state may restrict the parent's control ***Prince v. Commonwealth of Massachusetts***, ***supra*** at 166; ***Meyer v. Nebraska***, ***supra*** at 400; ***Sturges & Burn Mfg. Co. v. Beauchamp***, 231 U.S. 320 (1913) (regulating or prohibiting child labor); ***Jacobsen v. Massachusetts***, 197 U.S. 11 (1905) (compulsory vaccination of children); ***People v. Pierson***, 176 N.Y. 201, 68 N.E. 243 (1903) (exposing the community or children to communicable diseases); ***State v. Baily***, 157 Ind. 324, 61 N.E. 730 (1901) (requiring school attendance).

While earlier case law infrequently addresses the rights of children, more recent U.S. Supreme Court cases have recognized children's rights. ***In Re Gault***, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In 1979, the U.S. Supreme Court recognized the liberty interest of children in not being subjected to unnecessary medical or psychological treatment. ***Parham v. J.R.***, 442 U.S. 601, 61 L.Ed.2d 101, 99 S.Ct. 2493 at 2503 (1979).

Sections 4 through 6

1. Sections 4 through 6 of the proposed legislation do not on their face violate the Due Process or Equal Protection Clauses of the U.S. Constitution or the Due Process Clause of the Nebraska Constitution as being an arbitrary or unreasonable infringement of the liberty interests of parents or their children. The legislation does not on its face unreasonably or arbitrarily subject children to remedial social service programs. It does not unreasonably and arbitrarily subject parents to criminal sanctions for failing to appear for the court appearances of their children and for failing to address their children's criminal behavior by availing themselves of public or private social service resources.

The established doctrine is that liberty may not be interfered with under the guise of protecting the public interest by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. ***Meyer v. State of Nebraska***, 262 U.S. 390, 43 S.Ct. 625 at 627 (1923). The proposed legislation is aimed at requiring parents to take responsible action in order to address the criminal behavior of their children. Case law does not suggest that the types of measures proposed would be arbitrary or without reasonable relation to some purpose within the competency of the state to effect. A number of courts have upheld the constitutionality of provisions likewise imposing criminal

sanctions upon parents for failing to address the criminal behavior of their children. ***City of Eastlake v. Ruggerio***, 7 Ohio App.2d 212, 220 N.E.2d 126 (1966) (criminal sanctions upon parent for allowing child to violate curfew); ***People v. Walton***, 161 P.2d 498 (1945) (parents criminally responsible for allowing child to violate curfew); ***Commonwealth v. Slavski***, 245 Mass. 405, 140 N.E. 465 (1923) (parents sanctioned for allowing children to sell alcohol). The critical requirement of these cases is that criminal liability may not be imposed upon parents unless there is a voluntary act or voluntary omission to perform an act of which the parents are physically capable of performing. ***State v. Akers***, 400 A.2d 381 (1979) (holding parents criminally liable for the unlawful operation of off-road vehicles without reference to voluntary acts or omissions of parents violated due process); ***State v. Rackowski***, 86 A. 606 (1913) (holding it impermissible to criminally sanction parent without evidence she knowingly consented to her children breaking quarantine law). Criminal sanctions may not be imposed upon parents merely, because of their "status" as parents. ***Robinson v. State of California***, 370 U.S. 660, 82 S.Ct. 1417 (1962); ***Powell v. State of Texas***, 392 U.S. 651, 88 S.Ct. 2145 (1968).

Sections 4 through 6 of the proposed legislation may be subject to constitutional challenge as applied depending on the type of "social service support" deemed "appropriate." There are two approaches to challenging the constitutionality of a criminal statute, a facial challenge and a challenge based on the statute's application to a particular defendant. ***State v. Valencia***, 205 Neb. 719 at 727, 290 N.W.2d 181 (1980); ***State v. Saulsbury***, 243 Neb. 227 at 230, 498 N.W.2d 338 (1993). The statute may be subject to constitutional challenge as applied to a particular subject. For example, if the type of "social service support" deemed "appropriate" was in-patient treatment in a psychiatric institution, the statute may be subject to due process attacks under both the Nebraska and U.S. constitutions as an arbitrary and unreasonable infringement upon either the rights of the child or the parents or both. ***Parham v. J.R.***, 442 U.S. 584 at 604-608 (1979). This determination would have to be made on a case by case basis and cannot be addressed further in this opinion.

2. Portions of Sections 4 through 6 are vague and overbroad and, consequently, violative of due process. Vagueness is a constitutional vice conceptually distinct from overbreadth. ***State v. Copple***, 224 Neb. 672, 401 N.W.2d 141 (1987). A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment. ***State v. Valencia***, 205 Neb. 719 at 723, 290 N.W.2d 181 at (1980). There is no question, but that to meet the due process requirements of the Fifth and Fourteenth Amendments to the U.S. Constitution, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of exactly what conduct is forbidden. ***State v. Burke***, 225 Neb. 625, 408 N.W.2d 239 (1987); ***Kolender v. Lawson***, 461 U.S. 352 (1983).

A statute which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct. ***State v. Copple, supra.*** A penal statute has to be given sensible construction in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose sought to be served. ***State v. Burke, supra*** at 634.

The word "involved" is both vague and overbroad as used in Section 4. The term "arrest" is overbroad. The term involved means "not easily understood, intricate, complicated; or implicated, affected, or committed." Webster's New World Dictionary, 2nd Ed. (1982). The fact that a child is "involved" in one of the enumerated offenses triggers the parent's or guardian's obligation to invoke the assistance of public or private social service organizations. Yet, the child's conduct in fact or the parent's or guardian's view of the conduct may be that the involvement was not culpable. Innocuous or even laudatory involvement in some incident on the part of the child would not put parents or guardians on notice of a need to contact social service organizations. The term "arrested" would allow for prosecution of parents or guardians whose children were not ultimately found guilty of criminal conduct. It is not clear from the statute that the parents or guardians of those children without culpable involvement are relieved from the statutory requirements. Consequently, the term does not give parents and guardians sufficient notice of what conduct will render them liable for punishment. It could also subject people innocent of culpable conduct to criminal prosecutions for having failed to take unnecessary action to involve others in the upbringing of their children. The statutory defect could be cured by removing the words "involved in, or arrested for, or" on p.1707, line 7.

The language in Section 4 providing that unaccounted absences or late night absences shall put parents on notice is also vague and overbroad. First, the statute does not set out a clear standard for determining the proscribed conduct. The statute presumes that "unaccounted late night absences away from home" put parents on notice their children are involved in the enumerated criminal acts. "A statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." ***Tot v. U.S.***, 319 U.S. 463 at 467, 468, 63 S.Ct. 1241 at 1245 (1943); ***Doe v. City of Trenton***, 143 N.J.Super 128, 362 A.2d 1200 at 1202 (1976). See also, ***State v. Hruza***, 223 Neb. 837, 394 N.W.2d 643 (1986) (statutory presumption language in statute created permissible inference). It does not necessarily follow that because a child is staying out late or away from home that a parent should be on actual notice that their child is involved in the criminal conduct enumerated in Section 4. The absence from home may be "unaccounted" in the eyes of the law, but the parents or guardians may be unaware that the absences are unaccounted. Second, Due Process requires that criminal liability not be imposed upon parents unless there is a voluntary act or omission to preform an act which they are physically capable of performing. ***State v. Akers, supra; State v. Rackowski, supra; People v. Walton, supra;*** and ***Commonwealth v. Slavski, supra.*** See also

State v. Simants, 182 Neb. 491 at 493-497. As written, the statute would allow parents to be prosecuted for failing to obtain assistance to address criminal conduct that may not have occurred or when the parent had no knowledge of its occurrence. This offends Due Process. The defect might be remedied by rewording p. 1707, lines 16-21 as follows: For purposes of this section, notice may be proven by evidence of direct notice. Direct notice shall include oral or written notice from a law enforcement agency or a juvenile court of the child's conviction for anyone or any combination of the crimes listed in this section.

Section 7

Section 7 violates Due Process. This portion of the proposed legislation provides for the imposition of criminal sanctions upon parents without regard to whether there is a voluntary act or omission on the part of the parents or guardian that contributes to their child having a firearm of any kind and for any purpose. There is no sufficient reasonable relation between this provision and the end to be served (presumably the objective of keeping guns from children through the intentional or negligent mishandling of the guns by their parents). The provision would conceivably allow for prosecution of a parent whose 17 year old child possesses a long barrelled shotgun for purposes of hunting. The prosecution could be warranted without regard to whether there was any misuse on the part of the child and without regard to culpability on the part of the parent. Punishment of parents or guardians for innocent conduct offends due process. Numerous cases have held that even civil liability may not be imposed upon parents for the negligent use of guns by their children without a showing that the parents or guardian knew of the possession or use of the guns by their children. ***Pawluk v. Mayer***, 266 Wis. 55, 62 N.W.2d 572 (1954); ***Ritter v. Thibodeaux***, 41 S.W. 492 (1897, Tex.Civ.App.). As discussed above, attempts to impose criminal sanctions upon parents or guardians without regard to a voluntary act or omission have failed to pass constitutional muster, ***See, State v. Akers, supra; State v. Rackowski, supra; City of Eastlake v. Ruggerio, supra; People v. Walton, supra; Commonwealth v. Slavski, supra.*** Such provisions impermissably impose criminal sanctions upon people solely because of their parental status. ***State v. Akers, supra*** at 39; ***Doe v. City of Trenton***, 143 N.J. Super 128, 362 A.2d 1200 (1976) (Statutory presumption that two or more public peace violations in one year was the result of active or passive parental fault violated due process).

The constitutional infirmities found in section 7 could be remedied by limiting prosecution to those instances where it is shown that the parent or custodian knew of the child's possession of the gun. This opinion does not address the issue of whether it is appropriate public policy to criminalize possession of long barrelled guns by minors.

Respectfully Submitted,

DON STENBERG
Attorney General

Barry Waid
Assistant Attorney General

APPROVED BY:

Attorney General

40-533-13