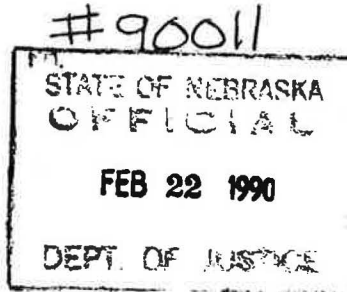


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA • STATE CAPITOL
TELEPHONE 402/471-2682 • FAX 402/471-3297 • LINCOLN, NEBRASKA 68509-8920

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General



DATED: February 21, 1990
SUBJECT: Language of LB 1022
REQUESTED BY: Senator Don Wesely, Chairperson, Health and Human Services Committee Nebraska State Legislature
WRITTEN BY: Robert M. Spire
Attorney General
Royce N. Harper
Senior Assistant Attorney General

You have requested an opinion as to whether the language of LB 1022 might be overbroad and, therefore, confer an unconstitutional delegation of legislative authority.

The language in section 1, "[n]otwithstanding any other provision of law the Director of Social Services shall have authority through rule or regulation to establish payment rates," may arguably be an unconstitutional delegation of legislative authority to an administrative agency.

Detailed Analysis and Response
to Senator Wesely's Question

Article II, section 1, and article III, section 1 of the Nebraska Constitution respectively provide for the separation of powers, and define legislative authority. Neb.Const., Art. II, § 1 & Art. III, § 1. However, a "grant of administrative authority is not an unconstitutional delegation of legislative authority." Blackledge v. Richards, 194 Neb. 188, 195, 231 N.W.2d 319, 324 (1975).

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Furthermore, "the legislature does have power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitation." Mann v. Wayne County Broad of Equalization, 186 Neb. 752, 759, 186 N.W.2d 729, 734 (1971). Also, a grant of power to an administrative agency must be "administered in accordance in accordance with standards prescribed in the legislative act." Terry Carpenter, Inc. v. Nebraska Liquor Control Comm'n., 175 Neb 26, 36-39, 120 N.W.2d 374, 380 (1963).

The language of LB 1022 granting an administrative agency authority "to establish payment rates," absent guidelines, restriction or limitations, and without a statement of express legislative purpose may be determined to be an unconstitutional delegation of legislative authority.

Two statutes, that appear to meet the court's requirements read:

. . . The department may contract with other social agencies for the purchase of social services at rates not to exceed those prevailing in the state or the cost at which the department could provide those services.

Neb.Rev.Stat. § 68-1206 (Reissue 1986).

The Department of Social Services shall establish uniform standards of financial eligibility for the treatment services, . . . including a uniform formula for the payment of services . . . and such formula for payment shall provide for reimbursement at rates similar to those set by other federal and state programs, and private entitlements.

Neb.Rev.Stat. § 68-1405 (Reissue 1986).

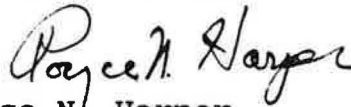
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The Health and Human Services Committee may wish to amend LB 1022 to include language that will cause the legislature to more closely match the court's requirement for constitutionality.

15-02-4

Very truly yours,

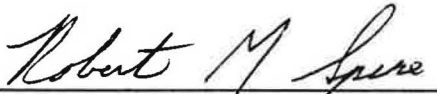
ROBERT M. SPIRE
Attorney General



Royce N. Harper
Senior Assistant Attorney General

cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:



Attorney General

15-02-4