

61.

LOCAL BOARDS OF HEALTH—MAY NOT COMPEL SCHOOL CHILDREN TO BE VACCINATED—SECTION 1261-26 G. C.

SYLLABUS:

The local boards of health, under the provisions of Section 1261-26, General Code, may not compel school children to be vaccinated.

COLUMBUS, OHIO, January 30, 1939.

DR. WALTER H. HARTUNG, *Director of Health, Departments of State Building, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads in part as follows:

“Will you kindly give me at your earliest convenience formal opinion as to whether local boards of health can compel school children to be vaccinated under the provisions of G. C. Sec. 1261-26 (Duties of boards of health; medical supervision of school children), * * *”

The duties of each district board of health are set forth in Section 1261-26, General Code, which provides in part as follows:

“In addition to the duties now required of boards of health, it shall be the duty of each district board of health to study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases. The district board of health may also provide for the medical and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools, public institutions, jails, workhouses, children’s homes, infirmaries, and other charitable, benevolent, correctional institutions. * * *”

The wording of the statute endows each district board of health with wide powers to protect the public health. It will be noted, however, that among the express powers delegated, dealing with school children,

i.e., to provide for their medical and dental supervision, etc., there is no specific mention of the power to compel their vaccination.

Section 7686, General Code, provides as follows:

“The board of each district may make and enforce such rules and regulations to secure the vaccination of, and to prevent the spread of small-pox among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public require. Boards of health, councils of municipal corporations, and the trustees of townships, on application of the board of education of the district, at the public expense, without delay, shall provide the means of vaccination to such pupils as are not provided therewith by their parents or guardians.”

In this section we find an express grant of power to each board of education to take the steps necessary for vaccination of school children, and it is within the power of each to apply to the district boards of health for the means to vaccinate “such pupils as are not provided therewith by their parents or guardians.”

We are now confronted with the problem of whether or not a district board of health, by virtue of Section 1261-26, General Code, can secure the vaccination of any school children without first obtaining an application for same from the local board of education, as provided in Section 7686, General Code. The general rule applicable to this type of problem is to the effect that public officers and boards have only such powers as are expressly delegated to them by statute, and such as are necessarily implied for the efficient exercise of those powers expressly granted. (32 O. J., 933 et seq.)

If Section 7686, General Code, did not exist, it might be urged that a local board of health could secure the vaccination of school children in the interest of public health and the prevention of disease. However, it appears that the Legislature, by omitting such express power in Section 1261-26, General Code, and inserting it in Section 7686, General Code, must have intended to give sole jurisdiction of this matter to the local boards of education.

Section 4449, General Code, provides:

“The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination.”

Herein, it seems, lies the extent to which local boards of health may go on their own initiative in connection with proposed vaccination of school children.

At the time Section 7686, General Code, was adopted, Section 4449, General Code, was already on the statute books. Had the Legislature so desired, it might have at that time amended Section 4449, General Code, to give local boards of health the express power to secure the vaccination of school children, and make such power concurrent with that bestowed upon local boards of education. Its failure so to do, I feel, strengthens the conclusion that such power was intended by the Legislature to rest exclusively with the local boards of education.

In the case of Carr vs. the Board of Education of Columbus, 1 N.P. (N.S.), 602, at Page 610 of the opinion, Judge Bigger, in discussing statutes similar to those cited earlier in this opinion, speaks as follows:

“In view of the fact that the board of education was thus given, by general law, supervision over the subject of vaccination of the pupils attending the public schools, it is, to say the least, very questionable whether it was the legislative intent to also confer the same discretionary power upon the board of health. The law upon the subject of health boards and their duties and powers nowhere makes any specific provision for the enforcement of vaccination among children attending schools. * * *”

Further along on the same page of that opinion the following language is used:

“* * * The conclusion seems to be reasonable that the Legislature may have reasoned that in view of the fact that boards of education had been clothed with power over the subject of vaccination of pupils in the schools, that to grant the same discretionary power to boards of health might lead to a conflict, and that the omission of this power over the subject of vaccination from the provisions of the act governing health boards, was an intentional omission and intended to prevent a clash of authority between two boards each clothed with the same discretionary power. * * *”

Generally speaking, the courts will not disturb any reasonable regulation or order of a local board of health when issued by virtue of its implied power, providing, of course, the regulation or order is in the interest of the public health and necessary for the protection thereof. An order for the vaccination of school children issued by a local board of health would clearly be one in the interest of public health. However, in view of the fact that such power has been expressly delegated to local boards of education by Section 7686, General Code, and the public health adequately protected therein, I feel the latter boards have exclusive power

and local boards of health may not, under the provisions of Section 1261-26, General Code, compel school children to be vaccinated.

Very truly yours,

THOMAS J. HERBERT,

Attorney General.