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EXAMINATION, PHYSICAL—CHILDREN, ATTENDANCE IN PUBLIC SCHOOL—MUST BE MADE BY SCHOOL PHYSICIANS, APPOINTED BY BOARD OF EDUCATION OR IN ABSENCE OF SUCH APPOINTMENT BY BOARD OF HEALTH—TEACHER OF PHYSICAL EDUCATION—NO DUTY AND WITHOUT AUTHORITY TO MAKE SUCH EXAMINATION.

SYLLABUS:

Under the provisions of Section 4838-6, et seq. of the General Code, physical examinations of children attending a public school must be made by school physicians appointed by the board of education, or in the absence of such appointment, by the board of health. A teacher of physical education in such school has no duty and cannot be given any authority to make such physical examination.

Columbus, Ohio, November 12, 1946

Hon. Mary F. Abel, Assistant Prosecuting Attorney
Bellefontaine, Ohio

Dear Madam:

I have before me your request for my opinion reading as follows:

“I have been requested by the Board of Education of West Liberty, Ohio, to seek your opinion on the following questions:

1. Can a physical education teacher be held liable for any or all accidents or injuries sustained by pupils in such classes?
2. Under the law of Ohio has the physical education teacher the right or duty to give each child in physical education class one or more physical examinations during the year? If so, to what extent does this authority or duty go?”

Section 4838-6, et seq., of the General Code deals with the powers and duties of boards of education relative to examination of pupils as to their physical health. Section 4838-6 provides in part as follows:

“The Board of Education of each city, exempted village or local school district *may appoint one or more school physicians* and one or more school dentists; provided two or more school districts may unite and employ one such physician and at least one such dentist whose duties shall be such as are prescribed by law. Said school physician shall hold a license to practice medicine in

Ohio, and each such school dentist shall be duly licensed to practice in this state. School physicians and dentists may be discharged at any time by the appointing power whether the same be a board of education or board of health or health commissioner, as herein provided. School physicians and dentists *shall serve one year* and until their successors are appointed and shall receive such compensation as the appointing board may determine. Such boards may also employ trained nurses to aid in such inspection in such ways as may be prescribed by the board. * * *

Such board may delegate the duties and powers, herein provided for, to the board of health or officer performing the functions of a board of health within the school district, if such board or officer is willing to assume the same. Boards of education shall cooperate with boards of health in the prevention and control of epidemics." (Emphasis added.)

Section 4838-8 reads in part as follows:

"School physicians may make examinations which shall include tests to determine the existence of hearing defects and diagnoses of all children referred to them. * * * Whenever a pupil, teacher or other school employee is found to be ill or suffering from positive open pulmonary tuberculosis or other communicable disease, the school physician shall promptly send such pupil, teacher or other school employee home, with a statement, in the case of a pupil, to its parents or guardian, briefly setting forth the discovered facts, and advising that the family physician be consulted. * * *"

Section 4838-9 reads as follows:

"The board of education of a city, exempted village or local school district may enter into a contract with a health district for the purpose of providing the services, as provided by law, of a school physician, dentist or nurse."

Section 4838-10 makes provision for examination of school children by the board of health, in the event of the failure of a board of education to employ a school physician, and such board of health is required to report the findings of such examination and make such recommendations to the parents or guardians of the children as are deemed necessary for the correction of defects.

The above quoted sections are a part of the new school code which became effective in 1943. Prior to the enactment of that code, Section

7692, General Code, was in effect and contained provisions looking to the employment of a school physician substantially identical with the present Section 4838-6 above quoted. Former Section 7692-1 had substantially the same provisions as Section 4838-8 from which I have above quoted. Construing these provisions, one of my predecessors in an opinion found in 1920 Opinions Attorney General, page 888, held as follows:

“The appointment of a supervisor and teacher of hygiene by a board of education for a term of four years, in the place of the school physician provided by law (7692, G. C.), is illegal. Boards of education cannot change the title of a statutory position while the duties remain the same, in order to increase the time of tenure.

The duties of the school physician in a school district are clearly set forth in Section 7692, G. C., et seq., and a person performing such duties authorized by the statutes can be appointed for a term of but one year and may be discharged at any time by the employing board.”

In the situation there presented the board of education had undertaken to confer upon a physician who was employed by the board of education as a teacher for a term of four years, the title of “supervisor and teacher of hygiene.” One of his duties was to make a physical examination of the school children. The then attorney general held that this procedure was illegal even though the appointee was a physician in good standing and his duties included the examination of children which, under the law, was to be made by a school physician appointed for a period of one year only.

In a further opinion found in 1925 Opinions Attorney General, page 366, it was held:

“A board of education may not advise, counsel, direct or order any minor child to submit to an examination by any person other than the school physician or his duly employed assistant physician unless an examination by said school physician discloses an underlying pathological condition requiring treatment by a specialist.”

In the course of that opinion reference was made to an unreported case of *Williams v. Jones*, decided by the Court of Common Pleas of Cuyahoga County, wherein an injunction was granted restraining the

defendant members of the school board from advising, counselling or ordering any minor pupil suffering from defective vision to submit to an examination by any particular class or school of physicians or eye specialists.

Your question appears to contemplate that the physical education teacher might undertake to give physical examinations to the pupils. In view of the provisions of the statute which clearly contemplate that such examination is to be given only by a school physician appointed by a board of education or in the absence of such appointment by the local board of health, it appears to me quite clear that the physical education teacher employed by a board of education would have neither the duty nor right to make such examination.

Referring to the first question set out in your letter as to the liability of a physical education teacher for any and all accidents or injuries sustained by pupils in his classes, it seems to me evident that that is a question that is purely personal to such teacher and its solution could have no possible relation to your duties as prosecuting attorney. Your attention is directed to Section 343 of the General Code which provides as follows:

“When requested by them, the attorney general shall advise the prosecuting attorneys of the several counties respecting their duties in all complaints, suits and controversies in which the state is, or may be a party.”

The question of personal liability of a teacher of course could not by any possibility involve the state in possible litigation or controversy. Accordingly, I do not consider that it is within my province to discuss or attempt to decide that question. Furthermore, it must be obvious that the possible liability of a teacher for such accident or injury must depend in every case upon the particular facts and circumstances and that it would be quite impracticable to attempt a comprehensive generalization on the subject.

Respectfully,

HUGH S. JENKINS
Attorney General