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BOARD OF EDUCATION—NO LEGAL AUTHORITY TO PAY PHYSICIAN FOR SERVICES RENDERED TO PUPIL ACCIDENTALLY INJURED IN SCHOOL.

There is no legal authority under which a board of education may pay a doctor bill for services rendered to a pupil accidentally injured in school.

COLUMBUS, OHIO, December 31, 1920.

HON. VERNON M. RIEGEL, *Superintendent of Public Instruction, Columbus, Ohio.*

DEAR SIR:—In your communication of recent date you request my opinion upon the following abstract question:

> "Has a board of education the legal right to pay the doctor bill for a pupil who is accidentally injured in school in case the board feels that it is under moral obligation to do so?"

While it would be easier to arrive at a conclusion, perhaps, if a concrete statement of the facts of a particular case were before us, it is believed that the question may be considered as a general proposition.

It is fundamental that a board of education cannot properly expend the funds entrusted to it except in pursuance to law. Therefore, it will be essential to consider whether there is statutory authority, express or implied, authorizing such an expenditure, or whether there is a liability in damages on the part of the board to a pupil injured as a result of the negligence of the board of education. If there should be such a liability, then it will be seen that the board might be justified in taking such action as would tend to minimize such liability.

Sections 7692 et seq. authorize the board of education to appoint a school physician and prescribe the duties of the physician when so appointed. However, upon consideration of these sections it is believed to be apparent that they do not cover a situation such as your question presents. It is further believed the only question essential to consider at this time is whether or not a board of education is liable in damages for a pupil who is injured.

In the case of Finch v. Board of Education of Toledo, 30 O. S. 37, it was held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability."

This doctrine was re-announced in the case of Board of Education v. Volk, 72 O. S. 469. However, in this connection consideration has been given to the opinion of the court in the case of Fowler, admx., v. City of Cleveland, 100 O. S. 158. In this case the plaintiff sought to recover damages from the city of Cleveland on account of injuries sustained by reason of the negligence of the fire department in the operation of a motor hose-truck upon the street while returning from a fire. It was held:

> "Where a wrongful act which has caused injury was done by the servants or agents of a municipality in the performance of a purely ministerial act which was the proximate cause of the injury without fault on the part of the injured person *respondent superior* applies and the municipality is liable."

This decision directly over-ruled the case of Frederick, Admx., v. City of Columbus, 58 O. S. 538, which held a municipality was not liable in a similar case.

The court in its opinion in the Fowler case, which is somewhat lengthy, reasons upon the hypothesis that there are two recognized kinds of functions performed by municipalities, namely, "governmental" and "ministerial or proprietary." The holding is that the fire department in this case was performing a "ministerial" function and that the city was liable for its negligent act. The inference is, if it is not expressly held, that there would be no such liability in a case where an agency of the government was exercising what might be termed "governmental" function. It is conceded that if the doctrine announced in said case were liberally applied it might be used as an argument to establish the liability in many other cases where the question of the liability of an agency of the government for its negligence or wrongful act is involved.

However, it seems proper to consider in this connection the case of Burwell vs. City of Columbus. In this case the plaintiff sought to recover damages from the city for false imprisonment because of his having been wrongfully arrested by a police officer of said city. A demurrer to plaintiff's petition was sustained by the court of common pleas on the ground that a municipal corporation is not liable in an action against a police officer. Later, the court of appeals, in a decision rendered September 29, 1920, affirmed the decision of the court of common pleas. The following is quoted from said decision:

> "We think the authorities, particularly in this state, are to the effect that a city is not liable for the action of a police officer in making an arrest under the state law. A police officer in such case while he holds a commission from the city acts for the state. We have examined the case of Fowler v. City of Cleveland and are of the opinion that the Fowler case is essentially different from the case under consideration."

The plaintiff filed a motion in the Supreme Court to direct the record to be certified upon the usual grounds, and submitted an extensive brief complaining of the error of the court below and relying upon the Fowler case. The Supreme Court over-ruled said motion:

Therefore, the conclusion must be that the law as declared by the courts in this state is that the fire department of a municipality while operating a motor hose-truck upon the streets of the city while returning from a fire performs a "ministerial" function, and the municipality is liable for its negligence while operating in such capacity; and, on the other hand, a police officer in making an arrest performs a "governmental" function, and the municipality is not liable for his negligence or wrongful act in such a capacity.

In view of the situation it is difficult to identify the line of demarcation between what the courts have termed "governmental" functions and "ministerial or proprietary" functions, and it is therefore difficult to anticipate from existing law what the decision might be in a given case wherein the question of liability for negligence or other agencies of the government are involved.

However, it must be kept in mind that the Supreme Court in Finch vs. Board of Education of Toledo and Board of Education vs. Volk, supra, has expressly held that a school board is not liable in its corporate capacity for damage resulting to pupils because of the negligence of the board. In the latter case the court recognizes a distinction between school boards and municipal corporations relative to their creation and status, as shown by the following quoted from its opinion:

> "Moreover while boards of education are 'bodies politic and corporate,' as declared by statute, yet like counties, they are but *quasi corporations* and

differ materially from municipal corporations as they are organized in this state. School districts are organized to promote education and carry into effect the provision of section 2 of article 6 of our state constitution. It says 'the general assembly shall make such provisions by taxation, or otherwise, as with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; * * *.' Boards of education for these school districts, are arms or agencies of the state for the promotion of education throughout the state, while 'municipal corporations' are called into existence, either at the direct solicitation or by the free consent of the people who compose them."

In view of this comment, together with other similar decisions which need not be set out herein, it is believed that it may fairly be said that strictly speaking boards of education are more clearly a sovereign agency of the state performing governmental functions than a municipality.

It must be conceded that it is a well established rule of long standing that an agency of the government is not liable in its corporate capacity for damages resulting from its negligence in the absence of a statute fixing such liability. It must be further held that this is now the general rule, and decisions such as the Fowler case only constitute exceptions to said general rule. In other words, it is believed that it is the rule of law that agencies of the state are not liable in their corporate capacity by reason of their negligence, excepting in those cases in which the statutes have expressly provided for such liability or in cases in which the courts have expressly fixed such liability. Therefore, until the holding in the case of Board of Education v. Volk, supra, has been expressly over-ruled by the Supreme Court of Ohio, or a statute has been passed fixing the liability of a board of education in the case of an injury to a pupil by reason of the negligence of the board, it must be regarded as the law of this state.

It will readily be seen that if a board of education is not liable to a pupil who is injured by reason of the board's negligence, or is not liable for its torts, then it is difficult to conceive of any case in which the board would be liable in case of an accident resulting in an injury to a pupil.

It is elementary that those transacting business with a board of education are bound to know the extent of its powers, and regardless of what action the board might take relative to employing a physician to attend an accidental case there would be no legal liability incurred. As above indicated, a board of education can only enter into such contracts and make such expenditures as it is authorized to make under the law.

In view of the foregoing, in specific answer to your inquiry, I am compelled to the conclusion that there is no legal authority for a board of education to pay the doctor bill for a pupil who is accidentally injured in school.

Respectfully,
JOHN G. PRICE,
Attorney-General.