

Opinion No. 43-4269

April 19, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Dr. James R. Scott, Director, Department of Public Health, Santa Fe, New Mexico

We are in receipt of your letter of April 16, 1943, in which you request our interpretation of the law governing compulsory smallpox vaccination, and ask the following questions:

- (1) "Can a judge order a child to be vaccinated?"
- (2) Under the law can a child be compelled to be vaccinated or is the only recourse fine or imprisonment?
- (3) Can every day, or every notice to be vaccinated and a refusal be considered as a separate offense under this law?"

The provisions of our statutes governing smallpox vaccination is Item 8, Section 71-301 of the 1941 Compilation, which is as follows:

"It shall be the duty of the school superintendent of each county to see that all children in his county of school age, are vaccinated against smallpox and to that end each teacher of a public school shall see that the children under his control have been successfully vaccinated and it shall be unlawful for any child to attend school or for any teacher to allow such child within any schoolhouse, unless so vaccinated, or showing proper certificate that it has been so vaccinated. Such teacher shall make report of the number of children whom he has caused to be vaccinated, and those who have presented proper certificates that they have been vaccinated, to the county school superintendent at the beginning of the school year, and as often thereafter as he may deem necessary, together with the report of the names of any parents who refuse to allow their children to be vaccinated and any person who shall refuse or neglect to have his or her children vaccinated according to law shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than ten dollars (\$ 10.00) nor more than one hundred dollars (\$ 100.00) or imprisoned in the county jail not exceeding one hundred (100) days."

In answer to your first question it is noted that the above quoted statute makes no provision for a court proceeding to compel the vaccination of a child. Thus the courts have no authority to enter an order compelling a child to submit to a vaccination, as there is no such proceeding at common law and as the statute merely makes it a crime upon the part of the parent to refuse to permit his child to be vaccinated. Further mandatory injunction will not lie, since

"It is now universally held that, except where there is express statutory authority therefor, equity has no criminal jurisdiction, and acts or omissions will not be enjoined merely on the ground that they constitute a violation of law and are punishable as crimes." 32 C. J. 275.

In view of the foregoing it is my opinion that your first question should be answered in the negative.

In answer to your second question, what has been said above applies in part. Further, no private individual or school official could compel a child to be vaccinated against his and his parents' will without subjecting himself to liability. However, fine and imprisonment of the parent is not the only remedy, in that the teacher of an unvaccinated child can prevent his attendance at school until he has been vaccinated or has obtained a certificate exempting him. In answer to your third question, I believe the rule laid down in 25 C. J 1180 is the proper rule of law to be applied to this question. There the author says:

"Where the prohibited act is continuing in its nature, an offender does not subject himself to cumulative penalties, but incurs only one penalty up to the time when an action therefor is commenced, unless a legislative intent that penalties shall accumulate is clearly expressed."

It is therefore my opinion that only one penalty, under the provisions of the above quoted statute, could be assessed, even though the refusal by the parent continued for many days or after many notices had been given.

It is further my opinion that if the parent is once fined or imprisoned for his refusal to have his child vaccinated, this would not prevent another later action for his refusal after the former penalty.

I inclose herewith copy of this opinion for your use.

By ROBERT W. WARD,

Asst. Atty. General