

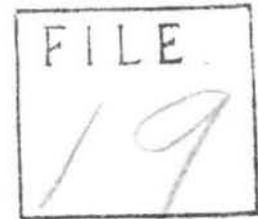
HEALTH:

Regulation made by Board of Curators of University of Missouri, requiring all students to submit to vaccination to prevent smallpox and their failure so to do constituting grounds for exclusion from the University, is a reasonable regulation and can be made and enforced by such Board of Curators.

April 21, 1942

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Mr. Leslie Cowan
Secretary
University of Missouri
Columbia, Missouri



Dear Sir:

Your letter of April 13, 1942, requesting an opinion has been referred to me. The opinion request is as follows:

"The Curators of the University of Missouri desire to have your opinion on the validity of its regulation regarding vaccination against smallpox which regulation reads as follows:

"Beginning with the fall of 1911 compulsory vaccination, under proper regulation, be required of all students of the University as recommended by the University faculty.

"It is ordered that students who fail to comply with the regulation regarding vaccination shall be required to withdraw from the University. The director of the Student Health Service shall administer this provision."

"From time to time some protest has been made by students who believe that the enforcement of this rule infringes their personal liberty and denies their absolute right to attend the University. However, our medical advisors have reported (1) that the only certain method

of controlling and preventing small-pox in a given community is by universal vaccination before any epidemic breaks out or is threatened; (2) that if vaccination is delayed until an epidemic, or even individual cases, breaks out in the community, there is a strong probability of the first outbreak occurring among University students, who by reason of their congregation in rooming houses, dormitories, and classrooms, are particularly susceptible to the transmission of contagious diseases; (3) that there is no substantial dispute among medical authorities on this question and public health records throughout the civilized world maintain their recommendation. It being the desire of the Board of Curators to preserve their regulation, the opinion of the University Attorney was asked on the question of their power to enact and enforce it.

"It has been his opinion, based upon the decision of in re Rebenack, 62 Mo. App. 8, and State vs. Cole, 220 Missouri 697, 119 S. W. 424, that the above regulation was not an abuse of the discretion vested in the Board of Curators by the Constitution of Missouri (Article II, Section 5) and the statutes of the State (Revised Statutes of Missouri, 1939, Section 10782) and that it could be enforced against a student protesting on grounds of personal religion even though no epidemic was threatening in the immediate vicinity. He has pointed out that while Section 10341 of the Revised Statutes, 1939, probably does not apply to the University of Missouri, both of the above cases were expressly decided upon the general powers of the school board in question, and the latter case particularly rejected the argument that the power granted by Section 10341 in regard to excluding students in public schools suffering from communicable diseases was exclusive. While Section 10814 in turn

authorizes the admission of all youths resident of the State of Missouri, that Section has been interpreted as a 'tuition' provision only (State ex rel. Gaines vs. Canada, 342 Missouri 121, 113 S. W. (2nd) 783). Moreover, the Missouri Constitution granted the right to free education between the ages of six and twenty to the students before the courts in the two cases cited above. The Curators were advised that while the Cole case, supra, was concerned only with a situation where an actual epidemic of smallpox was in progress and the opinion expressly confined itself to the facts before the court, it is unquestionable authority for the proposition that individual religious convictions or personal beliefs in matters of health, no matter how sincere, cannot be allowed to prevent the exercise of the discretion granted the 'governing' body of the school when the latter is supported by generally accepted medical opinion. Furthermore, the reasoning in the case, finding that vaccination of healthy persons may be required to prevent the spread of disease, as well as the exclusion of a person actually suffering from it, is directly applicable to a rule designed to prevent contagion from ever starting. It was asserted that the only issue was the reasonableness of the regulation, not the a priori wisdom of it, and the Court took judicial notice of the effectiveness of vaccination in controlling the ravages of the disease.

"Acting upon this medical and legal advice the Curators have consistently preserved and enforced the rule in question. Within the past year, however, several students embracing the Christian Science faith have so earnestly sought an exception in their cases, which the Board was unwilling to

make, and have so vehemently asserted their alleged constitutional rights that the Board of Curators desires your opinion on the matter."

Regarding the Board of Curators of the University of Missouri, we find a constitutional provision which is Article XI, Section 5, of the Constitution of Missouri. There is also a statutory provision regarding the Board of Curators.

Article XI, Section 5, of the Constitution of Missouri, reads as follows:

"State University- Curators.--The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University, now established, with its present departments. The government of the State University shall be vested in a Board of Curators to consist of nine members, to be appointed by the Governor, by and with the advice and consent of the Senate."

Section 10782, R. S. Mo. 1939, is as follows:

"University Established.-- A university is hereby instituted in this State, the government whereof shall be vested in a board of curators."

In both of the foregoing provisions the word "government" is present, so it will probably be best to determine what this word means in provisions of this kind.

In the case of State ex rel. Heimberger v. Board of Curators of University of Missouri, 188 S. W. 128, 268 Mo. 598, the Supreme Court held that the word "government" used in the constitutional provision above meant "guidance, direction, regulation, management and control."

Also with reference to the terms "government" with reference to a University, the following is found in West v. Board of Trustees of Miami University and Miami Normal School,

181 N. E. 144, l. c. 148, 41 Ohio App. 367: The term "government" in act vesting government of University in trustees held to include administrative rules and regulations affecting scholastic procedure as well as disciplinary measures.

Webster's Standard Dictionary defines "government" as, "control, direction or restraint exercised over men in communities."; "moral, mental or physical control."

Century Dictionary and Cyclopedia: "Guidance; direction; regulation; management; control; as the government of one's conduct."

Webster's New International Dictionary: "Act or fact of governing; exercise of authority in regulating the action of something; control; direction; rule; regulation; specifically the directions of the affairs of State; the ruling and administration of a political body."

From these definitions of the term "government" it would appear that the Board of Curators has the guidance, direction, regulation, management and control of the affairs of the University of Missouri.

Also, under Section 10807, R. s. Mo. 1939, is the following: "By-laws,--The curators shall have power to make such by-laws or ordinances, rules and regulations as they may judge most expedient for the accomplishment of the trust reposed in them, * * *."

There have been no decisions with reference to matters of the kind involved in this case and wherein the University of Missouri was directly interested. There have been two decisions involving the vaccination of students involving the "Public Schools" of the State. The Public Schools of the State have at the head of each district or division a Board of Directors who, like the Board of Curators of the University have the "government and control" of their particular districts. So, the Board of Curators are in the same position, as the Board of Directors of the cases which we will now cite. Consequently, if the Boards of Directors in these cases had the right to make and enforce rules regarding vaccination, the Board of Curators would also have such right, as the corresponding governing body over the University of Missouri.

The first case in which the vaccination of pupils was questioned was In re Rebenack, 62 Mo. App. 8. The facts were as follows: two children were excluded from the St. Louis schools due to the fact they were not vaccinated and their father would not have them vaccinated. When they were not permitted to continue school the father asked the court to issue a writ of mandamus to force the Board of Directors to admit his two children. At the time there did not appear to be an epidemic. Writ was denied.

The other case in which this question arose was State ex rel. v. Cole, 220 Mo. 697, 119 S. W. 424. Relator in this case was a resident of Sedalia and the father of two children who had been excluded from the public schools of that city due to the fact that they had not been vaccinated against smallpox. Relator asked for a writ of mandamus to force the School Directors to admit his children in school. It seemed that smallpox had been prevalent in Sedalia for eight years. Writ denied. The Court held in this case that where there is a "threatened epidemic," the school board has a right to pass rules and regulations regarding vaccination and has the power to enforce them. The Court said that it would not go beyond the facts in question which showed that there was a threatened epidemic.

However, in the Rebenack case, supra, the Court did not confine itself to cases where there was a "threatened epidemic" but held, "It results from the foregoing that we are not warranted in declaring the rule of the St. Louis School Board unreasonable and hence must deny the writ of mandamus."

It has also been held in this State in State ex rel. v. Cape Girardeau School District, 237 Mo. 640, 141 S.W. 640, that: "A board of education whose duty it is to maintain free public schools, has power to make reasonable regulations to guard the health of the pupils therein."

At 56 C. J. 818, Section 1003, the following is found:

"Sec. 1003 (b) In Absence of Specific Statutory Requirement -- A mere general power vested in administrative authorities to make such rules and regulations as they may deem necessary to the preservation of the public health, or to take

such measures as in their judgment may be necessary for the protection of the people from dangerous diseases, does not, it has been held in the absence of the existence or present menace of such disease, justify a regulation forbidding children to be enrolled in the public schools without a certificate of vaccination, but it has been held to the contrary that the power of the school authorities to exclude unvaccinated children from the public schools is implied from a general grant to make all proper rules, ordinances and statutes for the government and management of the schools."

As can be seen from the above, this question has been passed on in two different ways in this country but the cases cited from this State are the cases cited supra. The Rehenack case would allow a rule requiring vaccination regardless of an epidemic. The Cole case would allow such a rule in case of a threatened epidemic but does not pass on whether or not in the absence of a threatened epidemic, a rule of this kind would be reasonable. We do not think that the Cole case overrules the Rebenack case.

Again citing 56 C. J. 817, under footnote 76, the following is found, taken from the case of Viemeister v. White, 179 N. Y. 235, 72 N. E. 97, 103 AmSR 859, 70 L. R. A. 796:

"The right to attend the public schools of the state is necessarily subject to some restrictions and limitations in the interest of the public health. A child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both dangerous and contagious, may be lawfully excluded from attendance so long as the danger of contagion continues. Public health, as well as the interest of the school, requires this, as otherwise the school might be broken up and a pestilence spread abroad in the community. So a child recently exposed to such a disease may be denied the privilege of our schools until

all danger shall have passed. Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of the law. Nearly every state of the Union has statutes to encourage or directly or indirectly to require vaccination, and this is true of most nations of Europe. It is required in nearly all the armies and navies of the world. Vaccination has been compulsory in England since 1854, and the last act upon the subject, passed in 1898, requires every child born in England to be vaccinated within six months of its birth. It became compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Wurtemberg, Hesse and other German states, 1818; Prussia 1835; Rumania, 1874; Hungary, 1876; and Servia, 1881. It is aided, encouraged, and to some extent compelled, in the other European nations . . . It is compulsory in but few states and cities in this country, but it is countenanced or promoted in substantially

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all, and statutes requiring children to be vaccinated in order to attend the public schools have generally been sustained by the courts."

The case cited above was passed on in 1904 and it is the common knowledge or belief of the people generally that vaccination for smallpox is a preventative against such disease. This belief becomes stronger with each passing year. A rule of this kind operates impartially on all students and is not only for the protection of each individual student but is for the protection of all of the people of the State of Missouri. As stated in your letter, there seems to be no substantial dispute among medical authorities on this question.

Furthermore, at the present time, the means of travel and communication have been greatly speeded up from those at the time of the Viemeister, Cole and Rebenack cases. Diseases can be communicated much faster in this day and age and if vaccination is not enforced, an institution such as the University of Missouri would be a fertile field for the ravages of disease due, as you stated in your letter, to the crowded condition of the dormitories and classrooms. Therefore, it is only reasonable to believe that if the courts looked upon regulations of this kind as favorably as they did some thirty years ago, that if such matters were to come before them now, with the increased favorable knowledge of the people and the speed with which contagious diseases can be communicated, they would favor the passing and setting up of rules of this kind.

Now as to a question of the violation of Article II, Section 5, of the Constitution of Missouri, which said section reads as follows:

"That all men have a natural and in-defeasible right to worship Almighty God according to the dictates of their own conscience; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this State, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience; that no person ought,

by any law, to be molested in his person or estate, on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this State, or with the rights of others."

It might be said by the students in question that that part of the constitutional section cited above which says, "that no human authority can control or interfere with the rights of conscience," would prevent a rule of this kind being passed by the Board of Curators, since it might interfere with the "rights of conscience" of such students. However, further along in said section also will be found the following, "but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of this State or with the rights of others."

Students professing the Christian Science faith may feel that some of the rights guaranteed by the Constitution above are being violated by the regulations requiring all students of the University to be vaccinated before entering school. However, if the latter quotation cited above is considered, it can be seen that if a rule of this kind could not be enforced, those exempted might endanger the safety and rights of a majority of the students attending the University.

The number of students complaining about this regulation, is undoubtedly a small minority and the following excerpt taken from the case of State ex rel. Freeman v. Zimmerman, 86 Minn., 1. c. 358, seems to be the logical view:

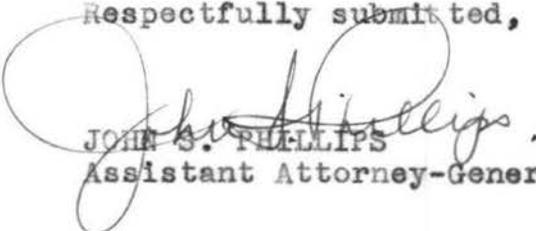
"The welfare of the many is superior to that of a few, and as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools."

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Conclusion

It is, therefore, the conclusion of this department that the regulation compelling students to be vaccinated against smallpox before entering the Missouri University and their failure to obey such regulation constituting grounds for exclusion therefrom, is a reasonable regulation and one which the Constitution of Missouri and the statutes have given the Board of Curators of Missouri University the power to make and enforce.

Respectfully submitted,


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Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

JSP:EG