

**Opinion No. 60-174**

September 29, 1960

**BY:** OPINION of HILTON A. DICKSON, JR., Attorney General

**TO:** Dr. John B. Sherman Director, Division of Preventive Medicine New Mexico  
Department of Public Health Santa Fe, New Mexico

**QUESTION**

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Can the State Board of Health, under existing statutes require annual tuberculin tests of all school children?

CONCLUSION

See Analysis.

**OPINION**

{\*566} **ANALYSIS**

An examination of New Mexico statutes discloses no statute specifically referring to tuberculin tests of school children. So far as New Mexico statutory law is concerned, our answer to your question could readily be a flat **no**. We choose, however, to interpret your question in the broader sense as regards the rule making powers of the State Department of Public Health.

Section 12-1-4, N.M.S.A., 1953 Compilation reads in part as follows:

{\*567} "The state department shall be responsible for the administration of the public health activities of the state as hereinafter provided, and in that respect shall:

(1) Supervise the health of the people of the state.

(2) **Investigate, control and abate** the causes of diseases, especially epidemics, sources of mortality and effects of localities, employment and other conditions of public health

.....

(5) Establish, maintain and enforce isolation and quarantine.

.....

(13) Operate and maintain laboratory facilities for the investigation of public health matters.

. . . .

(19) Establish, maintain and enforce such rules and regulations as may be necessary to carry out the intent of this act and to publish same."

Our New Mexico Supreme Court has decided no cases even remotely bearing upon the question at hand other than **Arnold v. Board of Barber Examiners**, 45 N.M. 57. Paragraph 15 of said decision reads in part as follows:

"The courts have recognized a wide latitude in the legislature to determine the necessity for protecting the peace, **health**, safety, morals and general welfare of the people. . . ." (Emphasis ours.)

In the absence of a specific statute and in the absence of cases decided by our Supreme Court we are compelled to go elsewhere for the law bearing upon the subject at hand to wit: to the encyclopedias and the decisions of the courts of other states of the Union. 25 Am. Jur., Sec. 3, page 287 reads:

"The preservation of the public health is one of the duties devolving on the state as a sovereign power. In fact, among all the objects sought to be secured by governmental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object. . . ."

25 Am. Jur., Section 8, page 289 reads:

". . . The power granted to administrative boards of health to adopt rules, by laws and regulations reasonably adopted to carry out the purpose or object for which they were created is generally held not to be a delegation of legislative authority in violation of the usual constitutional prohibition. For the protection of the health of the community, the most extensive powers may be conferred on such boards whether state or local. Whatever doubt there may be as to the extent of the powers not expressly conferred, there can be no question that the legislature may invest them with the most ample authority within the locality in which they are to act. . . ."

25 Am. Jur., Section 8, page 291 reads:

"The general rule is that statutes delegating to subordinate governmental agencies and authorities the power to enact and enforce health regulations are to be liberally construed in order to effectuate the purpose of their enactment. . . ."

8 A.L.R., page 836 sets forth an annotation entitled "General Delegation of Power to Guard against {\*568} spread of Contagious Disease. It states:

"A general statutory delegation of power to make regulations for the protection of the public health from contagious or infectious diseases is not unconstitutional, as a delegation of legislative power."

Under this annotation are cited cases from the highest appellate courts of the states of Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri and Washington.

Under a **general delegation** of the power to take measures necessary to prevent the spread of contagious disease, health officers have the power to provide for the isolation of persons afflicted with such a disease. **Ex parte Johnston**, 180 Pac. 644.

It was held in substance in **Sterich v. Board of Education**, 147 N.W. 779, that a resolution of a school board requiring as a condition of admission to a public school that each pupil present a record made by a physician of the results of a physical examination is not invalid as an unreasonable violation of a sacred right or as an unreasonable exercise of the police power.

**State ex rel Holcomb v. Armstrong**, et al., 239 Pac. 2d 545, the first unnumbered paragraph of the syllabus reads as follows:

"Mandamus proceeding by the State on the relation of Maurice S. Holcomb, as guardian ad litem of Dayis Holcomb, a minor, against Grant Armstrong and others, constituting the Board of Regents of the university of Washington, to compel respondent board to permit registration as a student at the University without submitting to an X-ray examination of the chest. The Superior Court, Thurston County, Charles T. Wright, J., rendered a judgment denying the application for a writ and relator appealed. The Supreme Court, Oslon, J., held that the Board of Regents had implied power to make and enforce the regulation requiring that all students before registration have an X-ray examination of the chest for detection of tubercular infection and that such regulation does not violate constitutional right of religious freedom."

If space permitted, we would like to quote this case almost in its entirety inasmuch as the questions involved therein are almost on all fours with your question. It involved the right of the University of Washington to compel a prospective student to submit before her acceptance as a student to an X-ray examination of her chest for the purpose of discovering possible tubercular infection. The Court held that the University had such power.

A considerable number of cases have held that the powers given to health authorities, although broad and far-reaching, are not without their limitations. It is generally held that board's powers to make rules and regulations must be exercised reasonably and whether a regulation is reasonable is a judicial question. It has been further held in a number of cases that if a responsible, honest and presumably reasonable body of professional opinions is found on the side of the regulation it will be upheld.

It is our opinion that the New Mexico Department of Public Health by virtue of Section 12-1-4, supra, can, within its sound discretion, promulgate regulations requiring annual tuberculin tests of all school children.

By: Carl P. Dunifon

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