

**Board of Health, Power Of. Vaccination, Authority to Order.
Schools, Vaccination In. Legislature, Power to Delegate
Authority.**

1. The legislature may delegate authority to state board of health to require pupils in public schools to be vaccinated.
2. To justify order of vaccination smallpox must exist, or be threatened and board must determine as question of fact whether such condition exists.

Helena, Montana, October 13, 1908.

Hon. Frank P. Whicher,
County Attorney,
Red Lodge, Montana.

Dear Sir:—

I am in receipt of your letter submitting the proposition as to the validity of an order heretofore made by the state board of health requiring all school children within the state to be vaccinated. This question presents several propositions of law as well as one important question of fact. The general propositions involved were considered at length by this office in an opinion addressed to the Hon. Thos. D. Tuttle, March 15th, 1905, which opinion is reported on page 55 of Opinions of Attorney General, 1905-'06. It is there held "that the legislature has a constitutional right to pass a law requiring all school children to be vaccinated before they shall be permitted to attend school, or to delegate such authority to boards of health to make and enforce such rules and regulations." This opinion is sustained by very many authorities both from the federal and state courts, and we will not here make further discussion of the law than to refer you to this opinion.

By the provisions of Section 1477, Revised Statutes, conferring general powers upon the state board of health, and by the specific provisions of Section 1504, Revised Codes, the legislature has delegated such authority to the state board of health and given such board the power of enforcing such provision within the limits and subject to such exceptions as appear in said Section 1504. It is the duty of the board to investigate the questions of fact involved, and after such investigation to determine upon the advisability of enforcing such a rule or regulation in any particular locality. When the board has done this, its rules, so made, have the force and effect of law, unless it can

be affirmatively shown that the board is in error as to the facts. It is not necessary that an epidemic of smallpox be actually prevailing in order to justify such a rule. It is sufficient if it is threatened; that is, if the community is in danger of such an epidemic. The determination of these matters is wholly a question of fact upon which we can give you but little assistance from this office. We can give our opinion on the law questions involved but must leave the determination of the questions of fact to the good judgment of the board and to the local authorities or to the court, if it becomes necessary to test the correctness of the board's conclusions. The presumption, of course, would be in favor of the board's ruling. We believe the law is thoroughly discussed in the opinion heretofore referred to and the numerous authorities there cited, and we respectfully refer you to that opinion, for the principles there announced are as applicable now as they were then, there having been no change in the statute that would affect the determination there announced.

Very truly yours,

ALBERT J. GALEN.

Attorney General.