NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

October 7, 1983

FILE NO. 83-017

PUBLIC HEALTH:
Exclusion of Non-immunized Children from
School Attendance During Measles Outbreak

Honorable Ronald C. Dozier
State's Attorney of McLean County
McLean County Law and Justice Center
104 West Front Street, Room 102
Bloomington, Illinois 61701

Dear Mr. Dozier:

I have your letter wherein you inquire (1) whether the Department of Public Health has authority to promulgate a rule which requires non-immunized school children whose parents or legal guardians object to measles immunization on religious grounds to be excluded from school attendance for a twenty-one day period following an outbreak of measles in the school; and (2) whether such a rule is an unconstitutional restriction on the free exercise of religion protected by the first amendment to the United States Constitution. For the reasons stated

below, it is my opinion that the Department possesses the authority to promulgate the rule in question and that the rule is not unconstitutional.

Chapter 3 of the Department's "Rules and Regulations for the Control of Communicable Diseases" (Circular No. 5.000, as amended, December, 1979) provides detailed procedures to be followed for all reportable communicable diseases. Under the heading "Measles", Part D (Measles Outbreak Control) provides:

> "1. Personnel in each attendance center responsible for investigating absenteeism must report suspected cases of measles to the school principal or the school nurse immediately.
>
> 2. On the same day that a report of a suspected case of measles is received, school personnel shall conduct an inquiry into absenteeism to determine the existence of any other cases of the illness in the suspect case's class and school.
>
> 3. A telephone report must be made by the school officials the same day to the local health authority, either a full-time official health department as recognized by the Illinois Department of Public Health or regional office of the Illinois Department of Public Health specifying the name, age, and sex of any case. The name of the case's private physician, if any, shall also be reported. The state or local health department must be contacted by school personnel and involved in the investigation of the outbreak so that all necessary vaccination services are assured.
>
> 4. A notice must be sent home with each student who has not presented proof of immunity explaining that the student is to be excluded, effective the following morning, until acceptable proof of immunity is received by the school or until 21 days after the onset of the last reported measles case in the case of medical or religious exemptions. Acceptable proof shall

> consist of: 1) a written record from the student's physician or parent or guardian which indicates dates of vaccination and type of vaccine administered; or 2) a statement from a physician indicating date when student had measles; or 3) a laboratory report indicating the student has a measles antibody titre of 1:16 or greater as measured by the Hemagglutination Inhibition test (or a comparable test)." (Emphasis added.)

Your first question is whether the Department has the authority to promulgate Rule D(4) which requires the exclusion of all susceptible non-immunized school children for a period of twenty-one days following the onset of the last reported case of measles .

It is axiomatic that "* * * inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created". (Aurora East Public School District No. 131 v. Cronin (1982), 92 Ill. 2d 313, 326.) While an administrative agency may not issue regulations which exceed or alter its statutory power or which are contrary to the legislative purpose of the statute, it has the inherent authority to regulate and execute the provisions of the statute and to carry out the powers conferred upon it. (Eastman Kodak Co. v. Fair Employment Practices Comm'n (1981), 86 Ill. 2d 60, 70.) An agency may promulgate such rules and regulations as are necessarily incident to and in furtherance of its express statutory purpose. (Lenard v. Board of Education (1978), 57 Ill. App. 3d 853, 863.) Additionally, courts have construed

liberally the powers of agencies created for the purpose of protecting the public health. People ex rel. Barmore v. Robertson (1922), 302 Ill. 422, 428; see also, Ethyl Corp. v. Environmental Protection Agency (D.C.Cir. 1976), 541 F.2d 1, 31; cert. denied (1976), 426 U.S. 941, 96 S.Ct. 2662, 2663, 49 L.Ed 2d 394.

Under section 55.02 of The Civil Administrative Code of Illinois (Ill. Rev. Stat. 1981, ch. 127, par. 55.02), the Department of Public Health is granted the authority:

> "[t]o have the general supervision of the interests of the health and lives of the people of the State and to exercise the rights, powers and duties of those Acts which it is by law authorized to enforce."

"AN ACT in relation public health" (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 22 et seq.) [hereinafter Public Health Act] grants the Department powers in matters relating to the causes and suppression of contagious and infectious diseases. Section 2 of the Act (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 22) provides, in pertinent part:

> "The State Department of Public Health has general supervision of the interests of the health and lives of the people of the State. It has supreme authority in matters of quarantine, and may declare and enforce quarantine when none exists, and may modify or relax quarantine when it has been established. The Department may adopt, promulgate, repeal and amend rules and regulations * * * as it may from time to time deem necessary for the preservation and improvement of the public health * * *.
>
> * * *

> The Department of Public Health shall investigate the causes of dangerously contagious or infectious diseases, especially when existing in epidemic form, and take means to restrict and suppress the same * * *.
>
> * * * "
>
> (Emphasis added.)

In addition to this general grant of authority, the Department is granted specific authority to control the spread of communicable diseases by "AN ACT in relation to the prevention of certain communicable diseases" (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 22.11 et seq.) [hereinafter Communicable Diseases Act] which provides, in pertinent part, as follows:

> "§ 1. Certain communicable diseases such as measles, poliomyelitis and tetanus, may and do result in serious physical and mental disability including mental retardation, permanent paralysis, encephalitis, convulsions, pneumonia, and not infrequently, death.
>
> Most of these diseases attack young children, and if they have not been immunized, may spread to other susceptible children and possibly, adults, thus, posing serious threats to the health of the community. Effective, safe and widely used vaccines and immunization procedures have been developed and are available to prevent these diseases and to limit their spread. Even though such immunization procedures are available, many children fail to receive this protection either through parental oversight, lack of concern, knowledge or interest, or lack of available facilities or funds. The existence of susceptible children in the community constitutes a health hazard to the individual and to the public at large by serving as a focus for the spread of these communicable diseases.
>
> It is declared to be the public policy of this State that all children shall be protected, as soon after birth as medically indicated, by the appropriate vaccines and immunizing proce-

dures to prevent communicable diseases which are or which may in the future become preventable by immunization.

§ 2. The Department of Public Health shall promulgate rules and regulations requiring immunization of children against preventable communicable diseases designated by the Director. Before any regulation or amendment thereto is prescribed, the Department shall conduct a public hearing regarding such regulation. The Department may prescribe additional rules and regulations for immunization of other diseases as vaccines are developed. * * *

The provisions of this Act shall not apply if:

1. The parent or guardian of the child objects thereto on the grounds that the administration of immunizing agents conflicts with his religious tenets or practices or,

2. A physician employed by the parent or guardian to provide care and treatment to the child states that the physical condition of the child is such that the administration of one or more of the required immunizing agents would be detrimental to the health of the child." (Emphasis added.)

The School Code (Ill. Rev. Stat. 1981, ch. 122, par. 1-1 et seq.) provides the Department additional authority for requiring the immunization of school children. Section 27-8.1 of the Code (Ill. Rev. Stat. 1981, ch. 122, par. 27-8.1) provides, in pertinent part:

" * * *

(3) Every child shall, at or about the same time as he receives a health examination required by subsection (1) of this Section, present to the local school, proof of having received such immunizations against preventable communicable diseases as the Department of Public Health shall require by rules and regulations promulgated

> pursuant to this Section and "An Act in relation to the prevention of certain communicable diseases", approved July 5, 1967, as amended.
>
> * * *
>
> (5) If a child does not submit proof of having had either the health examination or the immunization as required, then the child shall be examined or receive the immunization, as the case may be, and present proof by October 15 of the current school year; * * * If a child does not comply by October 15 of the current school year with the requirements of this subsection, then the local school authority shall exclude that child from school until such time as the child presents proof of having had the health examination as required, and presents proof of having received those required immunizations which are medically possible to receive immediately.
>
> * * *
>
> (8) Children whose parents or legal guardians object * * * to immunizations on religious grounds shall not be required to submit their children or wards to * * * immunizations if such parents or legal guardians present to the appropriate local school authority a signed statement of objection, detailing the grounds for such objection. If the physical condition of the child is such that any one or more of the immunizing agents should not be administered, the examining physician responsible for the performance of the health examination shall endorse such fact upon the health examination form. * * *
>
> * * * "

The scope of the Department's general authority in matters of quarantine was construed by the Illinois Supreme Court in People ex rel. Barmore v. Robertson (1922), 302 Ill. 422. In that case, the resident owner of a rooming and boarding house in the city of Chicago filed an application for a writ of habeas corpus in the Illinois Supreme Court alleging

that she had been unlawfully restrained of her liberty at her home by the city commissioner and department of health. The department had placed a quarantine upon the boarding house when it learned that several of the boarders had contracted typhoid fever. The quarantine required the owner to remain in the boarding house and prohibited her from preparing food for anyone but her own family. Additionally, no persons were permitted into the boarding house during the quarantine period unless they had been immunized against typhoid fever.

The court upheld the quarantine on the ground that the city department of health had acted within its lawful authority as an agent of the State department of health. The nature of a health quarantine was explained by the court at page 433:

> " * * *
>
> It is not necessary that one be actually sick, as that term is usually applied, in order that the health authorities have the right to restrain his liberties by quarantine regulations. Quarantine is not a cure--it is a preventive. As the term is used in this opinion, quarantine is the method used to confine the disease within the person in whom it is detected or to prevent a healthy person from contracting the infection. * * * Effective quarantine must * * * be not so much the isolation of the person who is sick or affected with the disease as a prevention of the communication of the disease germs from the sick to the well. * * *"
>
> (Emphasis added.)

The scope of the department's authority to enforce a quarantine was defined by the court at pages 432-33 as follows:

" * * *

> * * * While the powers given to the health authorities are broad and far-reaching they are not without their limitations. As we have said, while the courts will not pass upon the wisdom of the means adopted to restrict and suppress the spread of contagious and infectious diseases, they will interfere if the regulations are arbitrary and unreasonable. [Citations.] A person cannot be quarantined upon mere suspicion that he may have a contagious and infectious disease, [Citation.] but the health authorities must have reliable information on which they have reasonable ground to believe that the public health will be endangered by permitting the person to be at large. Where danger of an epidemic actually exists, health and quarantine regulations will always be sustained by the courts, [Citations.] but the health regulations are all sustained on the law of necessity, and when the necessity ceases the right to enforce the regulations ceases. Health authorities cannot promulgate and enforce rules which merely have a tendency to prevent the spread of contagious and infectious diseases, which are not founded upon an existing condition or upon a well-founded belief that a condition is threatened which will endanger the public health. * * *
>
> * * * "

The court upheld the Department's quarantine order under the general grants of authority to the Department contained in the Public Health Act and The Civil Administrative Code of Illinois. People ex rel. Barmore v. Robertson (1922), 302 Ill. 422, 432.

The authority of a local board of health to exclude non-immunized children from school for a limited period of time during an ongoing epidemic was upheld in Hagler v. Lerner (1918), 284 Ill. 547. In that case, a municipal board of

health passed a resolution requiring the exclusion of all non-immunized children from school for a period of two weeks during the existence of a small pox epidemic. In rejecting a challenge to the board's authority to promulgate such a rule, the court at page 550 noted that:

> "* * * The courts are practically a unit in holding that in the event of a present or threatened epidemic such rules and regulations as are now under consideration are reasonable and should be upheld,--and such has been the rule in States where there has been no express authority requiring vaccination. Where small-pox is epidemic it is not a necessary prerequisite to require vaccination that pupils have been personally exposed. [Citations.] It has been held in some jurisdictions that even without specific authority from the legislature or city council, local boards having control of schools or of the general care of the public health are justified by the existence of the emergency in making vaccination a condition for admission to the public schools. [Citations.] This court, in Potts v. Breen [167 Ill. 67], while making no direct decision upon the point, recognizes the rule that in cases of emergency, when necessary or apparently necessary to prevent the spread of small-pox and preserve the public health, pupils may be temporarily excluded from the public schools unless they are properly vaccinated or have had small-pox. * * *" (Emphasis added.)

The court held that a general statutory grant of power "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease" provided "ample authority" to pass a resolution requiring the exclusion of all non-immunized children from school for a period of two weeks during the existence of a small pox epidemic. (Hagler v. Lerner (1918), 284 Ill. 547, 551.)

Applying these standards to the circumstances in question, it is clear that the Department has not exceeded its lawful authority in promulgating Rule D(4). The Public Health Act authorizes the Department to promulgate rules and to "* * * take means to restrict and suppress [dangerously contagious or infectious diseases]". (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 22.) Rule D(4) employs a well-established and effective method for restricting the health hazard posed by an outbreak of a communicable disease. The rule is self-limiting in its operation: it requires the exclusion of all non-immunized students for a period of twenty-one days "* * * after the onset of the last reported measles case * * *". (Rule III, D.4.) Thus, the quarantine is applicable only when a measles outbreak is in progress. The quarantine is based upon reliable information derived from local authorities and its enforcement does not extend beyond the necessity upon which it is founded.

Statutes which relate to the same subject are in pari materia and should, if possible, be construed together so as to give effect to each statute. (People ex rel. City of Salem v. McMackin (1972), 53 Ill. 2d 347, 362.) As noted above, section 2 of the Public Health Act grants the Department "supreme authority in matters of quarantine" and authorizes the promulgation of such rules and regulations as the Department may deem necessary for the preservation of the public health. Section 1 of the Communicable Diseases Act and section 27-8.1 of The

School Code authorize the Department to require the immunization of all school children except those children whose parents or legal guardians object thereto on religious grounds or where immunization is medically contra-indicated due to the physical condition of the child. These restrictions on the Department's authority to require immunization cannot, however, be construed as limitations on the Department's authority to enforce a quarantine during epidemic conditions or to promulgate a rule requiring a quarantine under such circumstances.

For the foregoing reasons, it is my opinion that the Department of Public Health has the authority to promulgate a rule which requires the exclusion of susceptible non-immunized children from school for twenty-one days following an outbreak of measles in the school.

Your second question concerns the constitutionality of the rule at issue. As noted above, section 2 of the Communicable Diseases Act exempts from the Department's compulsory immunization requirement those children whose parents or guardians object thereto "* * * on the grounds that the administration of immunizing agents conflicts with [their] religious tenets or practices * * *." (Ill. Rev. Stat. 1981, ch. 111 1/2, par. 22.12.) Rule D(4) of chapter 3 of the Department's Rules and Regulations for the Control of Communicable Diseases requires, in the event of a measles outbreak, the exclusion of all non-immunized children from school for a

twenty-one day period following the onset of the last reported measles case. The question arises whether, as applied to religious objectors, the exclusionary sanction contained in Rule D(4) is an unconstitutional restriction on the free exercise of religion protected by the first amendment to the United States Constitution.

The Illinois Supreme Court has summarized the controlling principles in such cases as follows:

" * * *

> * * * It seems to be clearly established that the First Amendment of the United States Constitution as extended to the individual States by the Fourteenth Amendment to that constitution, protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals. Those cases which have sustained governmental action as against the challenge that it violated the religious guarantees of the First Amendment have found the proscribed practice to be immediately deleterious to some phase of public welfare, health or morality. * * *
>
> * * * "

(Emphasis added.) (In re. Estate of Brooks (1965), 32 Ill. 2d 361, 372.)

The test for determining the validity of State-imposed restrictions upon religious freedoms is an ad hoc balancing test which examines the facts of each particular case, focusing upon the interests of the State and its citizens. (Holmes v. Silver Cross Hospital (N.D.Ill. 1972), 340 F.Supp. 125, 130.)

Specifically,

> "* * * the persons claiming an exception from the regulations must [first] show that it burdens the practice of their religion. * * * Second, the restriction on the free exercise of religion will be balanced against the importance of the state interest in the regulation. [Third,] [e]ven if the state interest appears to be of a greater magnitude, the regulation will be invalid unless it burdens religion no more than is necessary to promote the overriding secular interest. This 'least restrictive means' test is merely another way of saying that an important state interest will not justify the limitation of the free exercise of religion unless an exemption for religiously motivated activity would unduly interfere with the achievement of that state interest." (Moody v. Cronin (C.D.Ill. 1979), 484 F.Supp. 270, 274.)

With respect to the first inquiry in the test cited above, it is questionable in the instant case whether Rule D(4) actually burdens religious practices. Courts have drawn a distinction between the free exercise of religious belief which is constitutionally protected against any infringement and religious practices that are inimical or detrimental to public health or welfare. (See Reynolds v. United States (1879), 98 U.S.145; 25 L.Ed. 244; Harvey v. Oliver (W.D.Ark. 1975), 404 F.Supp. 450, 456; People ex rel. Wallace v. Labrenz (1952), 411 Ill. 618, 625-26, cert. denied (1952), 344 U.S. 824, 73 S.Ct. 24, 97 L.Ed. 642.) Rule D(4) does not require immunization of all school children when it is contrary to the religious beliefs of the child's parent or guardian. Rather, the rule in question only prohibits such child's attendance at school when it would present a hazard to the community due to the child's

susceptibility to the disease in epidemic. In this respect, it appears that Rule D(4) does not directly burden the religious practices of those families which object to immunization.

Assuming arguendo that Rule D(4) imposes a substantial burden on religious beliefs or practices, there is no question in this case that the State's interest strongly outweighs the burden on first amendment rights imposed by the rule. Since 1905, courts have upheld against constitutional challenge compulsory vaccination and immunization programs that do not permit exemptions based upon religious beliefs. (See Jacobson v. Massachusetts (1905), 197 U.S.11, 25 S.Ct. 358, 49 L.Ed. 643; Zucht v. King (1922), 260 U.S.174, 43 S.Ct. 24, 67 L.Ed. 194; Marsh v. Earle (M.D. Pa. 1938), 24 F.Supp. 385; Sadlock v. Board of Education (N.J. 1948), 58 A.2d 218; Mountain Lakes Board of Education v. Maas (N.J.Super. 1959), 152 A.2d 394, aff'd (N.J. 1960), 158 A.2d 330 cert. denied (1960), 363 U.S. 843, 80 S.Ct. 1613, 4 L.Ed. 2d 1727; Matter of Viemeister v. White (N.Y. 1904), 72 N.E.97.)

In Hagler v. Lerner (1918), 284 Ill. 547, the Illinois Supreme Court addressed the balancing of interests in circumstances nearly identical to those under consideration here. In that case, the Granite City board of health had passed a resolution requiring that all children be excluded from school for a period of two weeks unless recently vaccinated against small pox. Small pox was epidemic in the city at the time the

resolution was passed. The appellants, children who were excluded from school because they were not immunized, brought suit alleging, inter alia, that enforcement of the resolution's exclusionary sanction violated their right to attend school under section 1 of article 8 of the Illinois Constitution of 1870. With respect to possible constitutional violations, the court stated at pages 552-54:

> "* * * The exercise of such authority by the board of health and the school board finds ample authority in the police power of the State when such a necessity arises as is shown in this case and no constitutional rights of appellants have been violated. No child has a constitutional right to carry to others in school the * * * disease of small-pox. * * * The police power is broad enough to protect all citizens against * * * exposure [to communicable disease], and it is not an unreasonable requirement to prevent children from having the benefits of school unless vaccinated * * * under such conditions as existed in Granite City when the resolution of the board of health was passed, and particularly when such exclusion was only for the period of two weeks and with the privilege to the children to remain unvaccinated by remaining out of school for such time."

Since the United States Supreme Court stated in Prince v. Massachusetts (1944), 321 U.S.158, 166-67; 64 S.Ct. 438, 441, 88 L.Ed. 645 that "* * *[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death", courts in numerous jurisdictions have recognized that the State's interest in suppressing communicable disease clearly outweighs the burden placed upon religious practices by

compulsory vaccination or quarantine measures. (See, e.g., Winters v. Miller (2d Cir. 1971), 446 F.2d 65, 70 cert. denied, (1971), 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed. 2d 369; Hagler v. Lerner (1918), 284 Ill. 547, 552-54; Mosier v. Board of Health (Ky. 1948), 215 S.W.2d 967, 969; Davis v. State (Md. Ct. App. 1982), 451 A.2d 107, n. 8; Brown v. Stone (Miss. 1979), 378 So. 2d 218, 222; Sadlock v. Board of Education (N.J. 1948), 58 A.2d 218, 220-22; In re Elwell (N.Y. Fam. Ct. 1967), 284 N.Y.S.2d 924, 930; see also, Vonnegut v. Baun (Ind. 1934), 188 N.E.677, 680; New Braunfels v. Waldschmidt (Tex. 1918), 207 S.W. 303.) Thus, according to the overwhelming weight of authority, the burden imposed on religious practices by Rule D(4) is plainly outweighed by the strong public interest in suppressing the spread of communicable disease.

The only remaining inquiry is whether Rule D(4) is the "least restrictive means" for achieving the State's purpose. Information submitted with your request indicates that measles is a highly communicable disease and that virtually every susceptible child in a given population will contract measles if it is introduced into that population. Since no immunization is 100 percent effective, even a child who has been immunized could contract the disease from a non-immunized child who is allowed to stay in school after the disease has been introduced into the school population. Thus, it is clear that allowing non-immunized children to attend school during a

measles epidemic would unduly interfere with the achievement of the State's goal in suppressing the spread of the disease. Also, the reasonableness of the rule in issue is evidenced by the fact that compulsory vaccination laws in other jurisdictions commonly provide an exemption for religious practices only in the absence of epidemic or other emergency conditions. See, e.g., Davis v. State (Ct. App. Md. 1982), 451 A.2d 107, n.3; Dalli v. Board of Education (Sup. Ct. Mass. 1971), 267 N.E.2d 219, 223.

For the foregoing reasons, it is my opinion that the exclusion of non-immunized school children from school pursuant to Rule D(4) of the Department does not impose an unconstitutional restriction on the free exercise of religion protected by the first amendment to the United States Constitution.

Very truly yours,

ATTORNEY GENERAL