1967

1. EDUCATION, BOARD OF—HAS RIGHT TO EXCLUDE FROM SCHOOLS A FEEBLE-MINDED CHILD INCAPABLE OF PROFITING BY ATTENDANCE AT SCHOOL—PRESENCE A DETRIMENT TO OTHER PUPILS—SECTION 4838-4 G. C.

2. SUPERINTENDENT OF STATE INSTITUTION FOR CARE OF FEEBLE-MINDED CHILDREN—HAS EXCLUSIVE RIGHT OF CUSTODY AND CONTROL OF FEEBLE-MINDED PERSON COMMITTED TO SUCH INSTITUTION—PERSON IN INSTITUTION—OUT ON TRIAL VISIT—SECTIONS 1890-7, 1890-98 G. C.

SYLLABUS:

1. A board of education has the right to exclude from the school under its charge a child who is feeble-minded and incapable of profiting by attendance at the school and whose presence is a detriment to the other pupils. The proceedings leading to such exclusion are governed by Section 4838-4, General Code.

2. The superintendent of a state institution for the care of the feeble-minded has under the provisions of Sections 1890-7 and 1890-98 of the General Code, the exclusive right of custody and control of a feeble-minded person who has been committed to such institution, both while such person is in the institution and while out on a trial visit.

Columbus, Ohio, June 13, 1947

Hon. Carl Abaecherli, Prosecuting Attorney, Warren County
Lebanon, Ohio

Dear Sir:

I have your request for my opinion, reading as follows:

"The superintendent of the Lebanon Exempted Village School District has asked me to consult you for an opinion regarding the following situation, since it is a novel one:

A few weeks ago a nine year old child began attending the first grade at the local school, said child having for a period of about two years been an inmate of the Orient Ohio School for Feeble-Minded Children. The child was

> committed to the institution by the Probate Court of this county upon the request of his stepmother, which was assented to by the child's father.
>
> From their observation of the child's mental condition, responsiveness, attitude and lack of physical and mental coordination, he being unable to walk well and being of very low mental capacity, it is the opinion of the local superintendent, as well as the principal and teachers, that the child not only cannot be helped in any way by attendance in the local school but that his attendance will continue to be a detriment and handicap to the other pupils in his class, as well as to the teachers.
>
> The local superintendent informs me that he has a letter from the superintendent of the Orient school that the latter is willing to receive this child back at any time for further care and treatment in that institution; however, I am informed that the child's father wishes to keep him in the local school and is unwilling to send him back to the institution. The auhorities of the local school are not certain as to his reason for this, but they have some reason to believe that the father wishes to keep the child in school while he and the child's stepmother are working and possibly avoid paying board for him at the state institution.

Therefore, based on the foregoing set of facts, our questions are as follows:

(1) Would the local school board have the right, under the circumstances, to exclude the child in question from attendance in the local school system, while the child is on a trial visit from the state institution and still under its jurisdiction?

(2) If so, what is the proper procedure for returning the child to the institution? In other words, would it be up to the local school authorities, or should the procedure be initiated by the superintendent of the institution? * * * *

(3) In the event your opinion is to the effect that it is legally possible for the local school authorities to exclude the child from attendance, what, if any steps is it necessary for them to take to legally effect such exclusion should the father still continue to insist upon their receiving the child at the school?"

I note that the child, who is the subject of your inquiry has been for two years an inmate of the Orient School for Feeble-Minded Children, having been committed to that institution by the Probate Court of Warren

County, on the request of his parents. I note further that he was allowed to enter the public school in question while on a trial visit from the state institution and while still under its jurisdiction.

Section 1890-98, General Code, relating to feeble-minded persons, makes reference to the statutes relative to the commitment and care of insane or mentally ill persons and adopts their provisions as applicable to the commitment and care of the feeble-minded. Accordingly, we may note the provisions of Section 1890-7, General Code, which gives the superintendent of the institution exclusive custody and control of the person of the patient. This section provides in part as follows:

> "The superintendent or person in charge of a state hospital, receiving hospital or any hospital operated by the state shall be the guardian of the person of the patients committed to such hospitals for the purpose of retaining them therein. *The superintendent of the hospital shall have exclusive custody and control of the person of the patient during the period of time he is detained for observation or treatment or both, whether a guardian of the person of said patient has been appointed or is appointed by any probate court. Such superintendent shall also be guardian of the person of the patient for the purpose of release on trial visit and shall retain the right of custody during the period of such trial visit.* Such superintendent shall have the right to determine the place of abode of such patient while on trial visit irrespective of the existence of a guardian of the person appointed by the probate court. * * *" (Emphasis added.)

Section 1890-62, General Code, authorizes the superintendent of a state hospital, when he deems it for the best interests of a patient, to permit him to leave the institution on a trial visit, which is to be for such period of time as the superintendent may determine, and subject to such requirements and conditions as he deems proper in the interest of the patient and of the public welfare.

Plainly, therefore, it is within the authority of the superintendent of the institution for the feeble-minded to which the child in question has been committed, to recall him from the trial visit, and I see no reason why the board of education should not communicate the facts to the superintendent and request him to recall the child, both in its interest and in the interest of the other pupils.

In case, for any reason, the superintendent of the institution does not see fit to act in response to such request, resort may be had by the board

of education to the statute relative to the suspension and expulsion of a child from school. Section 4834-5 of the General Code, contains the following general provision as to the right of a board to make rules and regulations for the government of the school:

> "The board of education shall make such rules and regulations as it deems necessary for its government and the government of its employees and the pupils of the schools."

In an opinion of my immediate predecessor, found in 1942 Opinions of the Attorney General, page 332, it was held:

> "Rules and regulations made by school authorities and health authorities respecting the health, general welfare and discipline of pupils in the public schools within their respective jurisdictions if lawful, reasonable, and made in good faith are not reviewable by the courts."

The situation that called for that opinion was one where certain children who were wards of a juvenile court, were afflicted with head lice. The opinion called attention to the fact that broad powers were extended to boards of education by law to make such regulations as may be deemed necessary for the pupils in the schools. The only provision found in the statutes which provides a method for removing a child from school is Section 4838-4, General Code, relating to suspension or expulsion. This section provides as follows:

> "No pupil shall be suspended from school by a superintendent or teacher except for such time as is necessary to convene the board of education, nor shall one be expelled except by a majority vote of the full membership of such board, and after the parent or guardian of the offending pupil has been notified of the proposed expulsion, and permitted to be heard against it. No pupil shall be suspended or expelled from any school beyond the current term thereof."

It will be observed that this statute lays down no specifications or limitations as to the causes for which a child might be suspended or expelled from school. The general policy of the state is unquestionably to afford free education to all its children within certain ages, and to compel them to attend school within those age limits. It appears to me, therefore, that the purpose of the General Assembly in providing for expulsion is not merely for discipline of the child in case he is unruly or incorrigible, but equally for the protection of the other pupils in case for

any reason the presence of a child in a school is considered harmful. Accordingly, the board of education is given a broad discretion to remove such child from the school. It seems to be quite clear that in the case of a child who can not in any way benefit by attendance in school and whose presence is detrimental to the other pupils and annoying to the teacher a situation is created that will justify the board of education in resorting to the statute authorizing expulsion of the child.

In the opinion to which I have referred, the case of Carr v. Town of Dighton, 229 Mass., 304, is cited, in which it appeared that a child had been excluded from school because it was afflicted with head lice, and the court held:

> "In the exercise of their broad powers giving the school committee general superintendence of all public schools, the decision of the committee involving the exercise of judgment and discretion, as to excluding from school a child because afflicted with head lice, is not reviewable by the courts when they act in good faith in determining the fact on which the decision is based."

It will be observed that Section 4838-4 supra, requires notice to be given to the parent or guardian of the pupil, of the proposed action, before an order of expulsion can be made. In the case which you present it would be eminently proper to give such notice to the parents of the child and also to the superintendent of the instiution, who is by law made the guardian of the person of the patient.

Respectfully,

HUGH S. JENKINS,
Attorney General.