

Roj:	AJCA 3/2010
Id Cendoj:	18087450052010200001
Court:	Administrative Litigation Chamber
Place:	Granada
Division:	5
Appeal No:	918/2010
Decision No:	362/2010
Procedure:	LITIGATION
Reporting judge:	ANTONIO CECILIO VIDERAS NOGUERA
Type of decision:	JUDICIAL DECREE

LITIGATION CHAMBER N 5

RG 918/2010

DECISION No 362/10

In Granada, November 24, 2010

Considering, and:

FACTS

FIRST.- The Health Department of the Autonomous Government of Andalusia (*Consejería de Salud de la Junta de Andalucía*) states:

1st) There has been an outbreak of measles disease in the city of Granada, with 36 confirmed cases on November 18, 2010. The outbreak started on October 9 and 10 with two affected children in the neighborhood of Albaycín; the disease spread due to low vaccination coverage among the children in the neighborhood, especially those attending the public school, *Colegio Público Gómez Moreno*.

2nd) Until November 18, 2010, all the cases were concentrated in this area and most of them attended *Colegio Público Gómez Moreno*, or have been in contact with an affected person, mainly in the hospital emergency rooms of the city, and then transmitting the disease to their family members.

3rd) Some parents do not want their children to be vaccinated, so there is a reason to believe that the measles virus will continue to circulate among children in the *Colegio Público Gómez Moreno* and in the neighborhood of Albaycín; preventing infants under 12 and 15 months of age (who are not old enough to be vaccinated) and vulnerable adults from getting infected will be impossible.

4th) The only way to control the epidemic is by vaccinating almost all children vulnerable to measles in the neighborhood and, particularly, those in the *Colegio Público Gómez Moreno*: children over 15 months of age according to the child immunization schedule or children over 12 months of age according to the current guidelines of the Andalusian Health Department.

SECOND.- The Chief of the Health Department's Epidemiology Section of the Provincial Office of Granada (*Sección de Epidemiología de la Delegación Provincial de Granada*) informs:

1st) Measles is a very infectious viral disease with a clinical presentation characterized by fever, exanthema (red spots on the skin) and other possible symptoms such as cough, rhinitis or conjunctivitis.

2nd) The most effective preventive measure is measles vaccine. The vaccination age is important for the immune response. The vaccine protects 94-98 % of vaccinated children from 12 months of age and 99 % of children vaccinated with two doses, the first with 15 months of age and the second with 3 years of age, according to the child immunization schedule of the Autonomous Government of Andalusia.

3rd) 10 % of the vaccinated children experience general discomfort and fever between 5 or 12 days following the vaccination. Those symptoms only last one or two days and cause few limitations to children's normal activity. In very few occasions convulsions caused by fever appear, although they do not cause after effects. Further, more serious illnesses are not associated with vaccination.

4th) Measles complications occur in between 5-15 % of the cases and present otitis media, laryngotracheobronchitis, pneumonia, diarrhea, febrile seizures, encephalitis and blindness. Children under 5 years living in bad conditions or malnourished, and immunosuppressed adults and patients have an increased risk of developing serious complications. A serious clinical presentation requires an admission in the hospital of a large number of cases, specifically 44 % of the 25 cases reported so far in the current outbreak in Granada.

Measles case fatality rate is approximately 1 per thousand in developed countries.

THIRD.- The Andalusian Health Department concludes:

1st) Because of the high infectivity of measles, the only way to control the epidemic is by vaccinating almost all children in the neighborhood of Albaycín and, particularly, those in the *Colegio Público Gómez Moreno*, over 15 months of age according to the child immunization schedule or over/under [sic.] 12 months of age according to the current guidelines of the Andalusian Health Department.

2nd) Since the beginning of the outbreak, three letters have been addressed to the parents of the 215 children between 3 and 15 years of age attending *Colegio Público Gómez Moreno*.

The letters were sent to report the situation and to request: a) vaccinating the unvaccinated children, either in the Health Center or in the school; and b) taking the child's vaccination record to the school to evaluate the risk of spreading measles.

3rd) On November 11, 2010 individual letters were sent *via* bureau fax with acknowledgement of receipt to the parents of the 79 unvaccinated children or of those who had not presented the vaccination records. On November 12, 2010 some parents demonstrated their intention to vaccinate their children. Up to November 15, 2010, 53 have not answered and 5 have expressly refused.

FOURTH.- On November 22, 2010 the Health Department of the Autonomous Government of Andalusia requests compulsory vaccination for the 35 children who have expressly refused the vaccine or have not completed the document to get the MMR vaccine (children's name and address attached in a separate list).

LEGAL REASONING

FIRST.- *Article 8.6 (2) of LJCA* states that "Likewise, the Administrative Courts are responsible for authorizing or ratifying the measures regarded as urgent and needed for public health by the health authorities and which entail deprivation or restriction of liberty or any other fundamental right."

The administrative powers that justify these measures of deprivation or restriction of liberty or any other fundamental right of the citizens are legitimized, in first place, by the *Section 43* of the Spanish Constitution (*Constitución Española*) which, after recognizing the right to health, states in *Section 43 (2)*: "It is incumbent upon the public authorities to organize and watch over public health by means of preventive measures and the necessary benefits and services. The law shall establish the rights and duties of all in this respect."

The basic development of this constitutional principle, the first principle of Spanish social policy, is stipulated in the Spain's General Health Law (*Ley General de Sanidad*), *Act 14/1986* of April 25; in the *Organic Act (Ley Orgánica) 3/1986* of April 14, on Special Measures Concerning Public Health (*Medidas Especiales en Materia de Salud Pública*); and in *Act 29/2006* of July 26, Guarantees and rational use of medicines and health products (*Ley de Garantías y uso racional de los medicamentos y productos sanitarios*), all of them enacted pursuant to the attribution of competences recognized in *Section 149.1.161* of the Spanish Constitution in favor of the State without prejudice to the competence concerning *Health and hygiene*, attributed to the Self-governing Communities (*Comunidades Autónomas*) by the *Section 148.1.21*.

SECOND.- But the *Organic Act 3/1986* of April 4, on Special Measures Concerning Public Health is the one that acts as an enabling authorization to the aforementioned attribution of competence to the Administrative Courts. Its social nature is imposed by its influence on some personal liberties and fundamental rights, aiming to protect public health and to prevent its loss

and deterioration. With this aim, Public Administrations are authorized, without overstepping its competences, to adopt certain measures when required by needed or urgent sanitary reasons. Some of the measures provided in its *Art. 2* are: medical examination, treatments, hospitalization, or control when there are reasonable grounds to suspect a danger for one or a group of people or due to sanitary conditions in which an activity is taking place. The open nature of these measures, required and legitimized to defend public health, is stressed in *Art. 3*, in accordance to which Public Administrations are empowered to adopt the necessary measures to control the affected people, those who have been in contact with them and the immediate environment, in order to control transmissible diseases.

THIRD.- When the right to physical integrity is stated to be at risk, the Constitutional Court is responsible to set out the necessary requirements to justify the constitutionality of the measure: pursuing an aim constitutionally lawful; adoption covered by a legal rule (principle of legality); being ordered by the court but not ruling out that other subjects might be entitled in case of urgency or necessity; motivation of the resolution by which it is ordered; and, finally, proportionate measure, so that the suitable and necessary measure implemented to pursue constitutionally lawful aims is not an excessive sacrifice. A final limitation must be added to these conditions, which operates both in application and legislation: “this kind of interventions must be carried out by health personnel that shall be medical specialists, should the characteristics of a serious intervention require so” and “the performance of the intervention must be carried out with respect for the dignity of the person, and the intervention shall not constitute, itself or by how it is performed, inhuman or degrading treatment, aspects absolutely prohibited (*Sections 10.1 and 15, Spanish Constitution*).”

FOURTH.- It is understood that there is not any debate about the measure requested by the Health Department of the Autonomous Government of Andalusia pursuing an aim constitutionally lawful; its adoption being covered by a legal rule; and the measure being proportionate, so that it is suitable and necessary to pursue constitutionally lawful aims and the sacrifice is not excessive. For that purpose, it will be enough to briefly remind what was stated in the second fact of this resolution: after the measles vaccine administration, 10 % of the vaccinated children experience general discomfort and fever between 5 or 12 days following the vaccination, symptoms that only last one or two days and cause few limitations to children’s normal activity; in very few occasions convulsions caused by fever appear, with no after effects; more serious illnesses are not associated with vaccination; measles complications occur in between 5-15 % of the cases and present otitis media, laryngotracheobronchitis, pneumonia, diarrhea, febrile seizures, encephalitis and blindness, being children under 5 years living in bad conditions or malnourished, and immunosuppressed adults and patients the ones with an increased risk of developing serious complications, leading to an admission in the hospital of a large number of cases due to serious clinical presentation; and being measles case fatality rate of approximately 1 per thousand in developed countries.

OPERATIVE PART

The Judge AGREES: to authorize compulsory vaccination of the 35 children in the list of the Health Department of the Provincial Office of Granada dated November 22, 2010, attached to this resolution a certified copy, in *Colegio Público Gómez Moreno*, in the Health Center, or in the children's house specified in the list. The vaccination must be carried out by medical specialists and the performance of the intervention shall not constitute under any circumstance inhuman or degrading treatment; if necessary, the Health Authority is authorized to call the State Security Forces and Bodies for help and shall notify the procedure, once performed, to this Court (the competing authority), indicating day and hour of the beginning and completion of the action, as well as the places where it has been carried out.

This resolution shall be reported to the parties indicating the possibility of lodging an appeal within fifteen days, in which case the bank voucher/ bank receipt/ deposit slip must be presented to certify the deposit amounting to € 50 to this Court's Appropriation Account in BANESTO, No 4376000022091810, mentioning in the "Observations" ("*Observaciones*") section "APPEAL DEPOSIT" ("RECURSO APELACIÓN"). If this procedure is not duly complied, the appeal process shall be terminated, in compliance with the Fifteenth Additional Disposition of the Organic Act of the Judicial Power (*Disposición Adicional Decimoquinta de la LOPJ*).

Hereby agreed, mandated and signed by Mr. Justice Antonio Cecilio Videras Noguera, presiding judge of the Administrative Litigation Chamber N 5, Granada. I attest/ hereby certify.