

U.S. DEPARTMENT OF LABOR  
EMPLOYMENT STANDARDS ADMINISTRATION  
WASHINGTON, D.C. 20210

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SEP 1972

This is in reply to your letter of August 15, 1972, to our Birmingham Office. You request an application for permission to employ a teenager as an aide in an extended care facility for kindergarten children for less than the required minimum age.

You advised a member of my staff by telephone that your facility is a kindergarten operating in a building provided by the church. In addition to the space, the church provides cots, tables, chairs, and kitchen facilities. Otherwise, the facility is financed solely by tuition payments by the parents of the children in the kindergarten. The children are all under school age except two or three who come in after school and wait for their parents to pick them up. The children enrolled receive planned teaching each morning from 8:00 to 11:00 at which time the teachers leave. From 11 a.m. until 6 p.m. other employees see that the children are served a meal, take a nap, and engage in supervised play. The facility operates from August through May each year in a period approximating the normal public school term. You stated that the five employees are paid the minimum wage or more at the present time but that your request was made in anticipation of a possible need for increased personnel in the future, in which case it is your desire to employ a full-time student under a special certificate.

Section 14 of the Fair Labor Standards Act provides that the Secretary of Labor, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment of full-time students in retail or service establishments or in agriculture, at a rate less than the minimum wage, under terms of special certificates.

A preschool is an enterprise as defined in the Act which provides for the care and protection of infants or preschool children outside their own homes during any portion of a 24-hour day. The term "preschool" includes any establishment or institution which accepts for enrollment children of preschool age for the purpose of providing custodial, educational, or developmental services designed to prepare the children for school in the years before they enter the elementary school grades. The term "preschool" includes day care centers, nursery schools, kindergartens, Head Start programs, and any similar facility primarily engaged in the care and protection of preschool children.

Schools have traditionally been regarded as non-retail establishments. There is no retail concept in the education industry. Congress recently passed the Education Amendments of 1972 which amended the Fair Labor Standards Act in a number of respects. More specifically, Congress amended sections 3(r)(1) and 3(s)(4) to include preschools along with elementary and secondary schools. Accordingly, since July 1, 1972, a preschool (kindergarten) of the type you operate would similarly be regarded as a non-retail establishment within the meaning of the Act.

At least one version of possible amendments to the Act now being considered by the Congress would permit the issuance of special certificates to educational establishments. If this provision should be finally enacted, certificates could be issued on or after the effective date, under conditions that would be prescribed by the law and regulations.

Since full-time student certificates under the present statute may now be issued only to retail or service establishments, or in agriculture, as explained above, we regret that it is not possible to approve such certificates for your facility at this time.

Sincerely,

Horace E. Menasco  
Deputy Assistant Secretary

WAGE AND HOUR DIVISION  
ASSISTANT SECRETARY