

FLSA-354

April 18, 1973

This is in reply to your letter dated January 30, 1973, concerning the application of the Fair Labor Standards Act to *** hereinafter referred to as ***.

*** is a private nonprofit agency working in cooperation with the ***. Its primary purpose is to supplement the protection, care, and nurturing a child receives from his parents with a program providing opportunities for children to develop physically, mentally, emotionally, and socially. This supplemental care may be provided because the mother works or because the family needs outside help, or the child has special problems.

Functionally, *** operates three distinct programs. The *** cares for mentally retarded individuals who cannot benefit from public school programming. This program is staffed by teachers under the direction of a program coordinator experienced and certified in working with the mentally handicapped. Emphasis is placed on (1) developing self-help skills, (2) stimulating sensory, motor, and speech development, (3) learning appropriate social behavior, both in the home and in the community, (4) physical exercise and activities, and (5) opportunities for socialization. Fees are charged on the basis of the parent's ability to pay. A social worker also provides service to the individual and the family. The Center is open from 9:00 am to 3:00 pm, Monday thru Friday, for 49 weeks out of the year. This Center would seem to meet the conditions for a covered school for mentally handicapped children under section 3(s)(4) of the Act.

The *** cares for children between the ages of 3 and 6 years who come primarily from low income families, such as working parent families, parents in the Work Incentive Program, and ADC families. The goals of the Center are to provide opportunities to develop positive self images, foster social growth, and provide a variety of learning experiences with an emphasis on language development. This program is staffed by teachers who are supervised by an experienced certified teacher. A full-time social worker handles special family problems. Fees are charged on the basis of a family's ability to pay. The Center is open from 6:30 am to 5:30 pm, Monday thru Friday, 52 weeks out of the year. As such, the *** Center would be a covered enterprise as discussed in the enclosed pamphlet entitled "Preschools".

The Day Care Homes program of *** provides a developmental program for children who are not ready to benefit by group experience because of individual problems, level of development, or whose needs can best be met with adequate care in a Day Care Home. These Homes are used for (1) children under the age of three years, and over the age of seven years, (2) children too immature for a group experience at the ***, (3) children who live in areas where a Day Care Home is more accessible than a Center, (4) school age children who need care that can be adapted to their needs, and (5) school age children whose brothers and sisters of various ages need day care. A sliding fee scale is used to determine the amount parents shall pay for the care of their children in a Day Care Home.

The fee is negotiated by *** social worker directly with the parent before the child is placed in the Home.

You indicated over the telephone on March 6, 1973, that there are presently six Day Care Homes affiliated with *** . Each Home is a private residence. The woman who will care for the children placed in the Home under this program is in all cases a mother who is already caring for her own children at home and who is interested in earning some extra money by caring for other parent's children. You further indicated that the Home mothers care for the children themselves without the aid of any employees. It is your opinion that the Home mothers are also not assisted in their work by a parent, spouse, child, or other member of their immediate families. The County Department of Social Services limits the number of children which may be cared for in a single home to five. This number includes the Home mother's own children as well as any other children that the Home mother may have contracted to care for on her own aside from *** . *** selects Home mothers based upon the fact that she likes and understands children, is capable of giving them affection and security, and she derives satisfaction from caring for them.

As you are aware, our Des Moines Area Office has concluded that *** Day Care Services is a covered enterprise within the meaning of sections 3(r)(1) and 3(s)(4) of the Fair Labor Standards Act based upon the facts set forth above and that all of the employees of *** must be paid a minimum wage of not less than \$1.60 per hour and overtime compensation at a rate of not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek, unless otherwise exempt. We concur generally in their opinion with respect to the *** programs. It is our opinion, however, that the residences of the subject Home mothers are distinct, physical places of business for the purposes of the Act and, as such, these establishments are excluded from the *** enterprise by the express language of the last sentence of section 3(s) which provides that any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such enterprise.

Because the Day Care Homes are thus outside the scope of the Act, it is unnecessary to rule on your specific questions concerning pay and deductions.

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division