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

DEC 4 1973

This is in reply to your letter of September 4, 1973, requesting an opinion on the possible employment relationship under the Fair Labor Standards Act between your client, the [redacted] Association for Retarded Children and certain retarded persons. Your inquiry is prompted by an investigation by our [redacted] Area Office which held that these retarded persons were employees of your client. You object to that determination, citing our opinion letter of July 19, 1968 as precedent for determining these people not to be employees.

In that letter we stated that "tasks performed by students in special schools for the mentally handicapped or retarded as a part of the school program to provide activities of therapeutic value for the handicapped student and to develop such capacities as he may have for doing useful things and, to the extent possible qualifying for gainful employment will not be considered under Section 3(g) of the Act as work of a kind requiring a school student to be considered an employee of the school conducting the program for purposes of the Fair Labor Standards Act". It should be noted that the opinion letter dealt with a case where so much constant supervision was required that the regular personnel spent "virtually all of their time with the children during the training periods". The letter also indicated that the children spent only an average of 1½ hours per day at their tasks.

The situation you present is significantly different than that treated in the opinion letter. The first group you ask about, those persons doing clerical and janitorial work, no longer attend school. They are ready for private employment in the community where, presumably, the supervision will be considerably closer to the range for non-handicapped employees. The third group you discuss, the lunch room workers, spend 2½ hours at work, more time than spent in instruction. After a short break-in period they perform their assigned duties with little more supervision than other employees.

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While the individuals in both of these groups are performing duties which have therapeutic value and are beneficial to them, it appears that they are in an employment situation. Their capacities for doing useful work have been fairly well developed and they apparently qualify for gainful employment. In fact, they spend a substantial amount of time in work beneficial to your client. On the facts we must consider these persons as employees of your client. We may add that they are engaged in activities within the purview of Section 14(d) of the Act for which certificates under 29 CFR 524 or 525 are indicated.

It would appear from the information we have that the second group of persons, those who make simple products for sale at your client's retail store, would not be doing work covered under the Act.

We suggest that your client discuss the matter of certificates under section 14(d) of the Act with our [redacted] office.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division