

FLSA-558

October 24, 1974

We regret the delay in responding to your letter of July 12, 1974, to*** Chief of the Branch of Coverage and Exemptions, Wage and Hour Division, with which you enclosed a resolution formulated by the Executive Committee of your Association.

Your resolution sets out a request that, in the administration of the Fair Labor Standards Act to preschool enterprises, the Wage and Hour Division establish criteria for distinguishing between those types of child care establishments which are custodial or recreational as against those which are developmental and educational. The purpose of such distinction would be to recognize the former types of establishments (as defined in section 13(a)(2) of the Act) for the purpose of utilizing the full time student certificate provisions of section 14.

To review briefly, preschools became subject to the Act's provisions (effective July 1, 1972) as a result of the Education Amendments of 1972 (Public Law 92-318 amending the Higher Education Act of 1965 and other Acts, including the Fair Labor Standards Act). Coverage of the Fair Labor Standards Act was extended to preschools by including them in section 3(s)(4) along with elementary and secondary schools, regardless of dollar volume of business or whether public or private or operated for profit or not for profit, provided that the enterprise which operates the preschool has employees engaged in interstate commerce or in the production of goods for interstate commerce or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person (Fair Labor Standards Amendments of 1974).

Although all of the types of enterprises enumerated in section 3(s)(4) are excluded by reference from the exemption from the Act's monetary requirements provided by section 13(a)(2), it is the position of the Wage and Hour Division that those establishments which meet the definition of a retail or service establishment in section 13(a)(2) may utilize the other exemption provisions applicable to such establishments set out in sections 14 and 13(a)(1), among others.

There is no legislative history on preschools which might provide guidance as to Congressional desire and intent in regard to the scope of the term "preschools". However, as Congress extended coverage of the Act to preschools on the same basis as elementary and secondary schools and based upon information obtained from the Office of Education, Department of Health, Education, and Welfare, and other sources, it is the Wage and Hour Division's position that kindergartens, nursery schools, day care centers, and other preschools provide some elements of basic education and, therefore, are outside the retail concept. This is supported by research findings on the growth and development of young children that indicate a critical foundation for intelligence and personality is laid during the first six years of life.

Therefore, we find that no readily recognizable criteria can be established to set apart the two types of preschool facilities for purposes of recognizing one as retail in nature as you suggest.

Sincerely,

Betty Southard Murphy
Administrator
Wage and Hour Division