FLSA-1092

June 27, 1978

This is in reference to your letter of May 4, 1978 requesting a determination whether the mentally disabled residents of a residential care facility operated by a client of your firm enter into an employment relationship for the purposes of the Fair Labor Standards Act when engaged in a work adjustment and training program involving on the job work experience in clerical, maintenance and food service functions within the residential facility.

As you are probably aware, the United States District Court for the District of Columbia held in Souder v. Brennan (Civil Action 482-73) that the minimum wage and overtime provisions of the Fair Labor Standards Act generally apply to patient workers at institutions for the residential care of any consequential economics benefit to the institution.

With regard to the cost of added supervision required by the program, it is our position that treatment and training programs and the supportive and ancillary services are necessary and integral ingredients in the care and treatment of patients and would have to be provided whether or not patient labor were involved. Therefore, the costs of operating such programs cannot be considered offsetting factors in determining economic benefit to the institution or in determining patient-worker wages.

In general, we would hold that there is consequential economic benefit to the institution if the work in question would be performed by someone else if it were not done by the patient or resident. Although we would normally not hold that a patient or resident undergoing evaluation or training during the first three months of engagement in a work activity or work activities is an employee, this provision is allowable only when the patient or resident spends no more than one hour a day and no more than 5 hours a week in such activities. In this connection, we note that your client's resident will have 20 hours a week in such work activities. Furthermore, the proposed work experience program, consisting of clerical, maintenance and food service work would appear to fall within those activities normally performed in the operation of an institution with several possible exceptions. A resident being taught basic statistics would not normally fall within an employee relationship unless statistical work normally performed by employees of the facilities is involved. Also, ordinarily the publication of a newsletter for resident use would not involve an employment relationship in itself unless the newsletter is intended for distribution outside the facility for a purpose benefiting the institution.

In order to prevent the curtailment of opportunities for employment for those workers performing work which would involve an employment relationship under the Act, Section 14 of the Act provides for the authorization under Regulations of special minimum wages below the statutory minimum for those workers whose earning or productive capacity is impaired by age or physical or mental handicap. In general, the Regulations (29 CFR Part 529) provide for payment based on the productivity of the

individual resident as it compares with normal productivity. The Regulations are sufficiently flexible to permit employment at these special minimum wages of even the least capable resident. A copy of the Regulations is enclosed for your clients information.

If additional information or assistance is needed with respect to specific occupations or work activities, the Atlanta Regional Office of the Wage and Hour Division which serves Florida will be pleased to help you in any way possible. That office is located at U.S. Department of Labor, Wage and Hour Division, Room 331, 1371 Peachtree Street, NE, Atlanta, Georgia 30309 (telephone: 404-881-7015).

Sincerely,

Herbert J. Cohen
Assistant Administrator

Enclosure