

May 4, 1982

This is in reply to your letter of April 9, 1982, concerning the application of the Fair Labor Standards Act (FLSA) to employees of a Head Start Center operated by your organization. Your letter also refers to WH Publication 1364 on preschools.

Section 13(a)(1) of the FLSA provides a complete minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity as those terms are defined and delimited in Regulations, 29 CFR Part 541. These regulations were developed after extensive public hearings.

Teachers may qualify for exemption as bona fide professional employees if all the pertinent tests described in section 541.3 of the regulations are met. The professional exemption for teachers under section 541.3, is applicable to an employee whose primary duty consists of the performance of:

- (1) teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed as a teacher in the school system or educational establishment or institution by which he or she is employed, and
- (2) whose work requires the consistent exercise of discretion and judgement in its performance; and
- (3) whose work is predominantly intellectual and varied in character (as opposed to routine mental) manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
- (4) who does not devote more than 20% of his or her hours worked in the workweek to activities which are not an essential part of and necessarily incident to the work above described (unless paid on a salary or fee basis of not less than \$250 per week).

While preschools engage in basic educational activities for the children attending, preschool employees whose primary duty is to care for the needs of the children would not ordinarily meet the requirements for exemption as teachers.

Although your letter does not indicate the level of education attained by the teachers in question, it should be noted that work which can be performed by employees with education and training below the college level would not be work of a bona fide professional level within the meaning of the regulations. Such work, even though basically teaching or instructing, does not require the consistent exercise of discretion and judgment nor would be predominantly intellectual and varied in character so as to permit exemption as a bona fide professional employee.

Under the direction of Secretary Donovan, the regulations for many departmental programs and related matters are being reexamined to ascertain their usefulness and effects on the individuals concerned. In addition, Regulations, Part 541 have been targeted for review under E.O. 12291 by the President's Task Force on Regulatory Review. The department welcomes the views of interested parties with respect to its programs in an effort to improve employment standards for the American worker while reducing the regulatory burden on the employer. The issues raised in your correspondence will be given careful consideration in our review of this regulation.

Sincerely,

William M. Otter
Administrator