U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2008-17

December 19, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether Certified Occupational Therapist Assistants (COTAs) employed by the school district qualify as exempt professional employees under section 13(a)(1) of the Fair Labor Standards Act (FLSA).[1] It is our opinion that COTAs do not qualify as exempt professionals.

The COTAs are currently classified as nonexempt, paraprofessional employees. You state that the COTAs are requesting to be reclassified as professional employees under section 13(a)(1). The primary duty of a COTA is assisting occupational therapists in providing therapeutic educational programs for students. According to the school district's COTA job description, the only educational requirement is that which is sufficient to obtain certification by the state Board of Occupational Therapy Examiners. One of the prerequisites for certification by the state is the completion of "at least 60 academic semester credits or the equivalent from an accredited institution of higher education." Tex. Occ. Code Ann. § 453.203(a)(2)(B).

Section 13(a)(1) of the FLSA exempts from the Act's minimum wage and overtime pay provisions, "any employee employed in a bona fide . . . professional capacity" as defined in 29 C.F.R. part 541. 29 U.S.C. § 213(a)(1). The term "employee employed in a bona fide . . . professional capacity" in section 13(a)(1) of the FLSA means "any employee":

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . exclusive of board, lodging, or other facilities; and
>
> (2) Whose primary duty is the performance of work[] [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

29 C.F.R. § 541.300(a).

The salary information provided indicates that the COTAs are compensated more than $455 per week as required by 29 C.F.R. § 541.600.[2]

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

[2] We assume that the salary basis requirements under 29 C.F.R. § 541.602 are met for purposes of this reply.

The primary duty test under the learned professional exemption requires that:

> (1) The employee must perform work requiring advanced knowledge;
>
> (2) The advanced knowledge must be in a field of science or learning; and
>
> (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

29 C.F.R. § 541.301(a). The phrase "work requiring advanced knowledge" means "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work." 29 C.F.R. § 541.301(b). "The phrase 'customarily acquired by a prolonged course of specialized intellectual instruction' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree." 29 C.F.R. § 541.301(d).

We do not believe that the COTAs meet the primary duty requirements of § 541.301(a). The COTAs' primary duty does not require "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.300(a)(2)(i). Occupations that "require only a four-year degree in any field or a two-year degree as a standard prerequisite for entrance into the field . . . do not qualify for the learned professional exemption." 69 Fed. Reg. 22,121, 22,150 (Apr. 23, 2004). *See* Wage and Hour Opinion Letter FLSA2005-9 (Jan. 7, 2005) (two-year associate degree paralegal programs do not qualify as prolonged course of specialized intellectual instruction); Wage and Hour Opinion Letter May 2, 2001 (avionics technicians with training equivalent to associate's degree do not qualify for the learned professional exemption) (copy enclosed). Therefore, the completion of 60 semester hours does not qualify as a "prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.301(d).

Further, it is our opinion that COTAs do not meet the definition of a registered or certified medical technologist. The regulations contain specific academic requirements for exemption:

> Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

29 C.F.R. § 541.301(e)(1). Becoming a COTA only requires 60 semester hours of study, rather than the more rigorous course of study required for registered or certified medical technologists.

The existence of a mandatory, accredited certification program for COTAs, standing alone, does not satisfy the regulatory requirement for a prolonged course of specialized intellectual instruction for entry into the field. According to the Preamble to the 2004 revisions to Part 541 of the regulations:

> Accredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative, if certification does not involve a prolonged course of specialized intellectual instruction.

69 Fed. Reg. at 22,157.

Consequently, because the occupational therapist assistant occupation does not require "knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction," it is our opinion that these employees do not qualify for the "learned professional" exemption. 29 C.F.R. § 541.300(a)(2).

Additionally, the COTAs do not qualify for the exemption for administrative employees in educational establishments. *See* 29 C.F.R. § 541.204. Section 541.204 provides an exemption for employees "whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof." 29 C.F.R. § 541.204(a)(2). Section 541.204(c)(2), however, states that "jobs relating to the health of the students . . . do not perform academic administrative functions" and do not fulfill the requirements for the educational establishments exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Alexander J. Passantino
Acting Administrator

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**