FLSA-575

April 18, 1975

This is in reference to your letter of January 17, 1975, *** regarding the application of the Fair Labor Standards Act to handicapped clients of the Division of Vocational Rehabilitation who are receiving training in State institutions. You request an opinion from the Department of Labor that these clients are not involved in an employment relationship under the Fair Labor Standards Act.

Whether or not patients or residents engaged in work in an institution are employees under the Act is a question of fact. The Wage and Hour Division will be glad to respond to specific fact situations to advise whether in our opinion there is an employment relationship under the Act. However, neither the Administrator of the Wage and Hour Division nor the Secretary of Labor has the authority to exclude a covered employment relationship situation from the application of the Fair Labor Standards Act.

You state that there is for each client an individualized written rehabilitation plan, that the programs have been established to rehabilitate severely disabled persons and their purpose is not to provide the institution with a work force, that the clients generally do not produce at any significant level as compared to nonhandicapped workers, and that the programs rehabilitate clients who ultimately leave the institution and enter the competitive labor market. These factors in themselves would not make a patient engaged in work a nonemployee under the Act.

Determination of whether a patient engaged in work is an employee under the Act depends upon all the circumstances of a given situation other than the level of performance of the patient and whether the work is of therapeutic value to the patient. A major factor in determining whether an employment relationship exists is whether the work performed by the patient is of any consequential economic benefit to the institution.

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. However, where a patient is undergoing evaluation or training, we will not hold the patient to be an employee during the first three months of engagement in a work activity or activities provided the patient spends no more than one hour a day and no more than 5 hours a week in such activities and provided further that competent instruction and supervision is provided the patient during such period.

You also state that the income from this program to the Rehabilitation Center, which I presume operates the program for your agency, is an insignificant part of the agency's total income and therefore the Rehabilitation Center is not a residential institution within the meaning of the Act and regulations. As I understand the program, the clients being rehabilitated by the Rehabilitation Center are either residents or outpatients of an institution. If this is the situation, then the income test would relate to the institution and not to the Rehabilitation Center or the Division of Vocational Rehabilitation. Thus, if

more than 50 percent of the institution's income is attributable to providing residential care for the sick, the aged, or the mentally ill or defective, it is a covered institution under the Act.

While you are correct in your statement that the Court's order in Souder v. Brennan applies only to patient workers at institutions for the residential care of the mentally ill or mentally retarded, the requirements of the Act also apply to patient workers at institutions which are primarily engaged in the residential care of the sick and the aged. The term "sick" in this context would include individuals suffering from a physical or mental infirmity or sickness of any kind.

With respect to the matter of outpatients, the definition of "Patient worker" in the Final Regulations, Part 529 include both residents and nonresidents who are receiving treatment or care by the institution.

With regard to possible conflict with the goals and objectives of the 1973 Rehabilitation Act, the Department of Labor proceeded with respect to patient workers on the basis of Souder v. Brennan . There have been other supportive decisions on the applicability of the FLSA to patient workers. Also Senator *** Chairman of the Committee on Labor and Public Welfare, stated that his Committee agreed with the Court in the Souder decision. That Committee also deals with vocational rehabilitation legislation.

I hope this letter will provide sufficient guidance with respect to the matters you have raised.

Sincerely,

Warren D. Landis
Acting Administrator
Wage and Hour Division