No. 09-6128

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HILDA L. SOLIS,
Secretary of Labor,

Plaintiff-Appellant,

v.

LAURELBROOK SANITARIUM AND
SCHOOL, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Tennessee

BRIEF FOR THE SECRETARY OF LABOR

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT REGARDING ORAL ARGUMENT vii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF THE ISSUE 2

A. Statement of Facts and Course of Proceedings 3

B. The District Court's Decision 19

SUMMARY OF ARGUMENT 20

ARGUMENT 23

APPLYING THE CORRECT LEGAL STANDARD TO ALL THE RELEVANT FACTS OF RECORD, WHICH THE DISTRICT COURT FAILED TO DO HERE, INEVITABLY YIELDS THE CONCLUSION THAT LAURELBROOK STUDENTS ARE EMPLOYEES FOR PURPOSES OF THE FLSA BECAUSE THEY DO NOT MEET ANY OF THE SIX PORTLAND TERMINAL FACTORS; APPLYING THE PROPER LEGAL STANDARD TO THE RECORD EVIDENCE ALSO SHOWS THAT A PERMANENT INJUNCTION WAS WARRANTED AS A MATTER OF LAW. 23

A. Standard of Review 23

B. The Child Labor Provisions of the FLSA 25

C. A Trainee's Employee Status Under the FLSA is Measured by the Six Portland Terminal Factors ... 28

D. Proper Application of the Portland Terminal Test to Laurelbrook's Vocational Training Program Establishes that the Students are Employees for Purposes of the FLSA 36

E. A Permanent Injunction Should Issue as a Matter of Law because of Laurelbrook's Child Labor Violations and its Failure to Show That it Intends to Comply with the FLSA in the Future ... 57

CONCLUSION 62

Page

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases:

Archie v. Grand Cent. P'ship, Inc.,
997 F. Supp. 504 (S.D.N.Y. 1998) ..... 31&passim

Atkins v. General Motors Corp.,
701 F.2d 1124 (5th Cir. 1983) 31,36,49

Blair v. Wills,
420 F.3d 823 (8th Cir. 2005) 51

Bobilin v. Board of Educ.,
403 F. Supp. 1095 (D. Haw. 1975) 51

Brennan v. Correa,
513 F.2d 161 (8th Cir. 1975) 59,61

Brock v. Big Bear Mkt. No. 3,
825 F.2d 1381 (9th Cir. 1987) 59,60

Brock v. City of Cincinnati,
236 F.3d 793 (6th Cir. 2001) 24

Brock v. Shirk,
833 F.2d 1326 (9th Cir. 1987),
vacated on other grounds,
488 U.S. 806 (1988) 58

Brock v. Wendell's Woodwork, Inc.,
867 F.2d 196, 198-99 (1989) 52

Cutter v. Wilkinson,
423 F.3d 579, 582 (6th Cir. 2005) 53

Dole v. Shenandoah Baptist Church,
899 F.2d 1389 (4th Cir. 1990) 52,53

Cases -- continued: Page

Donovan v. American Airlines, Inc.,
686 F.2d 267 (5th Cir. 1982) 32,37,49

Dunlop v. Davis,
524 F.2d 1278 (5th Cir. 1975) 58,59

Federal Exp. Corp. v. Holowecki,
128 S. Ct. 1147 (2008) 31

Gulf King Shrimp Co. v. Wirtz,
407 F.2d 508 (5th Cir. 1969) 59

Herman v. Hogar Praderas de Amor, Inc.,
130 F. Supp. 2d 257 (D.P.R. 2001) 48

Marshall v. Baptist Hosp., Inc.,
473 F. Supp. 465 (M.D. Tenn.
(1979), rev'd on other grounds,
668 F.2d 234 (6th Cir. 1981) ..... 33&passim

Marshall v. Baptist Hosp., Inc.,
668 F.2d 234 (6th Cir. 1981) ..... 32&passim

Marshall v. Chala Enters., Inc.,
645 F.2d 799 (9th Cir. 1981) 58

Marshall v. Regis Educ. Corp.,
666 F.2d 1324 (10th Cir. 1981) 51

Marshall v. Van Matre,
634 F.2d 1115 (8th Cir. 1980) 60

Martin v. Funtime,
963 F.2d 110 (6th Cir. 1992) 25,58,59,60,61

McLaughlin v. Ensley,
877 F.2d 1207 (4th Cir. 1989) 32,42,48

Prince v. Massachusetts,
321 U.S. 158 (1944) 53

Reich v. Parker Fire Prot. Dist.,
992 F.2d 1023 (10th Cir. 1993) 32,35

Reich v. Petroleum Sales, Inc.,
30 F.3d 654 (6th Cir. 1994) ..... 22&passim

Cases -- continued: Page

Reich v. Shiloh True Light Church of Christ,
No. 95-2765, 1996 WL 228802 (4th Cir.
May 7, 1996) (85 F.3d 616 (Table)) 28,57

Reich v. Stewart,
121 F.3d 400 (8th Cir. 1997) 25

Secretary of Labor v. 3Re.com, Inc.,
317 F.3d 534 (6th Cir. 2003) 23-24

Shelby County Health Care Corp. v. Majestic Star Casino,
581 F.3d 355 (6th Cir. 2009) 24

Shiloh True Light Church of Christ v. Brock,
670 F. Supp. 158 (W.D.N.C. 1987) 52

Shultz v. Salinas,
416 F.2d 412 (5th Cir. 1969) 23,59

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 31

Solis v. FirstCall Staffing Solutions, Inc.,
No. 08-0174-CV-W-ODS, 2009 WL 3855702
(W.D. Mo. Nov. 18, 2009) 60,61

Solis v. Laurelbrook Sanitarium & Sch., Inc.,
No. 1:07-cv-30, 2009 WL 2146230
(E.D. Tenn. July 15, 2009) ..... 20&passim

Tony & Susan Alamo Found. v. Secretary of Labor,
471 U.S. 290 (1985) 51,57

U.S. v. Rosenwasser,
323 U.S. 360 (1945) 29

Walling v. Jacksonville Terminal Co.,
148 F.2d 768 (5th Cir. 1945) 37

Walling v. Nashville, C. & St. L. Ry.,
155 F.2d 1016 (6th Cir. 1946),
aff'd, 330 U.S. 158 (1947) 37

Walling v. Portland Terminal Co.,
330 U.S. 148, 152 (1947) ..... 20&passim

Cases -- continued: Page

Wirtz v. Flame Coal Co.,
321 F.2d 558 (6th Cir. 1963) 23,60

Wirtz v. Wardlaw,
339 F.2d 785 (4th Cir. 1964) 48

Statutes and Regulations:

Fair Labor Standards Act,
29 U.S.C. 201 et seq. 2

Section 1, 29 U.S.C. 201 2
Section 3(d), 29 U.S.C. 203(d) 28
Section 3(e)(1),29 U.S.C. 203(e)(1) 28
Section 3(g), 29 U.S.C. 203(g) 28
Section 3(l), 29 U.S.C. 203(l) 25,26,27,28
Section 12(c), 29 U.S.C. 212(c) 25,28
Section 13(c), 29 U.S.C. 213(c) 26
Section 13(c)(2), 29 U.S.C. 213(c)(2) 27
Section 14(d), 29 U.S.C. 214(d) 28
Section 17, 29 U.S.C. 217 1
Section 59, 29 U.S.C. 259 33

28 U.S.C. 1291 1
28 U.S.C. 1331 1
28 U.S.C. 1345 1
42 U.S.C. 2000bb(a), (b) 53

29 C.F.R.:

Section 530.35(a) 18,26
Section 570.31 et seq. 26
Section 570.34 18
Section 570.35a 28
Section 570.35(a) 18
Section 570.50(b) 28
Section 570.50(c) 28,47
Section 570.50(c)(1)-(2)(i)-(ii) 46
Section 570.50(c)(2) 46
Section 570.50(c)(2)(iii)-(iv) 46
Section 570.50-.68 27
Section 570.52 19
Section 570.54 19
Section 570.55 19
Section 570.59 19

Statutes and Regulations -- continued: Page

Section 570.62 19
Section 570.65 19
Section 570.67 19
Section 570.71 19
Section 570.71(a) 28

Miscellaneous: Page

6th Cir. R. 30(b) 1

Employment Standards Admin., U.S. Dep't of Labor, *Employment Relationship Under the Fair Labor Standards Act*, WH Pub. 1297 (Rev. May 1980), available at http://www.osha.gov/pls/epub/wageindex.download?p_file=F11973/WH1297.pdf 30

U.S. Dep't of Labor, Wage & Hour Division Field Operations Handbook (1993)

Section 10b03(f) 51
Section 10b11(b) 21,30-31
Section 10b11(b)(1) 38
Section 10b11(b)(2) 48
Section 10b11(b)(3) 53
Section 10b11(b)(4) 55
Section 10b11(b)(5) 56
Section 10b11(b)(6) 57
Section 10b24(a) 51
Section 10b24(b) 51
Section 10b26(a) 28

U.S. Dep't of Labor Opinion Letter:

FLSA2002-8, 2002 WL 32406598 (Sept. 5, 2002) 31
FLSA2006-12, 2006 WL 1094598 (Apr. 6, 2006) 31
1975 WL 40999 (Oct. 7, 1975) 31,39
1986 WL 1171074 (Jan. 17, 1986) 53,57
1986 WL 1171130 (Mar. 27, 1986) 31
1996 WL 1005201 (May 1, 1996) 41,54,56
1998 WL 1147717 (Aug. 11, 1998) 31

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor requests oral argument in order to adequately present her position on the issue raised in this appeal. The correct resolution of this issue, which concerns the applicability of the child labor provisions of the Fair Labor Standards Act to students at a vocational school, is of utmost importance to the enforcement of that Act. The Secretary believes oral argument would assist this Court in its consideration of this question.

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On Appeal from the United States District Court
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BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 217, 28 U.S.C. 1331 (federal question), and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has jurisdiction to review the July 15, 2009 Memorandum and Judgment Order of United States District Court Judge Curtis L. Collier, 1:07-cv-30, pursuant to 28 U.S.C. 1291 (final decisions of district courts) (R.84,85).[1] The Order

[1] Pursuant to Local Rule 30(b), the Secretary has included in this brief an addendum designating relevant district court

is a final judgment that disposes of all claims. A timely notice of appeal from the district court's final order was filed by Plaintiff-Appellant Hilda L. Solis, Secretary of Labor ("Secretary"), on September 11, 2009 (R.87).

STATEMENT OF THE ISSUE

Whether the district court erred as a matter of law by concluding that students working at Laurelbrook Sanitarium and School ("Laurelbrook") are not employees subject to the child labor provisions of the FLSA, 29 U.S.C. 201 et seq., thereby denying the Secretary's request for a permanent injunction.

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documents, and cites to those documents as "R. (number corresponding to certified list filed with this Court)." Testimony contained in the transcript identifies the witness and is cited "tr. (Transcript page number(s))." The exhibits admitted in this case are not available in the district court's electronic record; therefore, the relevant portions of those exhibits relied upon in the Secretary's brief have been reproduced in the Secretary's appendix and are cited "App." (Appendix page number). Plaintiff's and defendant's exhibits are cited "P.Exh." and "D.Exh." (exhibit page number(s))." The District Court's July 15, 2009 Memorandum denying the Secretary's request for a permanent injunction is cited in the statement of facts as "Mem." and references the specific finding of fact ("FOF") being discussed.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings[2]

1. Laurelbrook is a private, not-for-profit Tennessee corporation located in Rhea County, Tennessee (R.68,P.Exh.5 (Laurelbrook Policy Manual) at 3-4;App.3-4)). Laurelbrook was founded and is operated by lay members of the Seventh-day Adventist denomination, and is modeled after the principles and practices of that faith. Id.; R.68,P.Exh.82 (Laurelbrook financial statements prepared by private Certified Public Accountant firm) at 6;App.110). The corporation operates a 50-patient bed nursing home (the Sanitarium) licensed by the State of Tennessee, a boarding school for grades 9-12, an elementary school and day care facility for the children of staff members, and a farm (R.84 (Mem., FOF 10)).[3] Laurelbrook shares a single board of directors, which makes policy and handles finances for the corporation (R.68,P.Exh.2 (List of Laurelbrook Board of Trustees);App.1; R.61(tr.15)). Its adult "members" (who are not

[2] Some of the facts set forth in this statement go beyond those specifically found by the district court. These facts are largely undisputed. To the extent that certain material facts set forth in this brief are in conflict with those found by the district court, those facts were either informed by an incorrect understanding of the applicable law, or were clearly erroneous. See infra.

[3] Laurelbrook receives Medicaid reimbursement for care it provides at the Sanitarium (R.84 (Mem., FOF 33)). Approximately 90 percent of the nursing home patients pay for their care through the state Medicaid program (R.68,P.Exh.82 (Laurelbrook financial statements prepared by private Certified Public Accountant firm) at 7, pt. F;App.111).

at issue in this case) work at the school, farm, and Sanitarium, and usually live on the Laurelbrook campus. Laurelbrook does not consider its members to be paid employees but, rather, "volunteer workers" of the institution (R.68,P.Exh.5 (Laurelbrook Policy Manual) at 4;App.4). Although Laurelbrook does not pay its members as employees, the institution takes care of members' essential needs, such as housing, food, supplies, and child care, based on their effort and responsibility. Id. at 30; R.84 (Mem., FOF 25).

2. Laurelbrook Academy, which is a school for grades 9-12, was first accredited in 2006 by the E.A. Sutherland Education Association ("EASEA"), an independent accrediting agency for religiously-affiliated schools, such as Laurelbrook, that follow the teachings of the Seventh-day Adventist Church ("Church") (R. 84 (Mem., FOF 22,24)). The vocational education provided in EASEA schools is based on the teachings of Ellen White, who founded the Church (R.84 (Mem., FOF 7)). The Seventh-day Adventist "model" seeks to have students perform hands-on work to instill a work ethic. Id. There is nothing in this model that requires students to perform work that is hazardous or otherwise prohibited by the child labor laws (R.71(tr.171);R.73(tr.1218-19,1229-30)).

3. Laurelbrook Academy provides scholarships to all its students, which are based on the students' citizenship grade,

academic grade, and vocational grade (R.68,P.Exh.6 (Laurelbrook 2006-2007 Manual) at 25;App.8; R.60(tr.341-42)). Students who supervise other students receive an additional scholarship of $40 to $80 per month (R.68,P.Exh.6 (Laurelbrook 2006-2007 Manual) at 26;App.9). Students also receive additional scholarships for vocational training performed during scheduled leaves and vacation periods. Id. Conversely, scholarship amounts can be reduced if students fail to report to work. Id. at 12-13;App.6-7; R.60(tr.350).

4. Laurelbrook's vocational training program follows a "plan of rotation" with the purpose of exposing the student to training and experience in several areas. Vocational areas offered by Laurelbrook include home economics, home management, and child guidance (all of which are limited to girls); basic woodworking, construction, and electricity (all of which are limited to boys); and agriculture, leadership and nursing (offered to both boys and girls) (R.84 (Mem., FOF 32); R.68,P.Exh.7 (Laurelbrook 2007 Handbook) at 4;App.13). This "vocational training experience" requires students to work in the following departments: Sanitarium nursing, Sanitarium dietary (kitchen), Sanitarium laundry, Sanitarium maintenance, Sanitarium housekeeping/environmental services (cleaning), academy (school) kitchen, school maintenance, grounds, general maintenance, boiler, woods (firewood), farming, and special

student services (religious work) (R.68,P.Exh.28 (Laurelbrook vocational training codes);App.68; R.69(tr.509-10)). Each rotation is intended to focus on one particular vocational department at a time, and lasts for nine consecutive weeks during the school year (R.69(tr.503); R.68,P.Exh.8 (Boys' Dorm Handbook) at 23;App.15).[4]

The vocational program is required for students in grades 9-12. Prior to the entry of the preliminary injunction in the present litigation in April 2007, it also was required for seventh and eighth graders, who received scholarship funds (R.61(tr.66-69);R.60(tr.341-42)). The routine schedule for vocational training is four hours a day, Sunday through Friday, comprised of a half-hour or hour of in-service instruction, followed by actual vocational work (R.84 (Mem., FOF 30);

[4] Students who do not go home over school breaks work during these breaks, even though that work is not counted towards students' nine-week vocational rotations and the students' work is not necessarily in the vocational area in which they are training (R.61(tr.188,244)). One former student described their role as "floaters," filling in where needed. Id. at tr.188-89. Charles Hess, Laurelbrook's president, explained that it is necessary to rotate student breaks to provide sufficient staffing to keep vital nursing home and school functions operational. Id. at tr.64-66. Students also are required to work for half the summer (R.68,P.Exh.8 (Boys' Dorm Handbook) at 23;App.15;R.61(tr.243)). And, because Laurelbrook operates seven days a week, students and staff members continue to work over the weekends, including the Sabbath, to keep areas such as the kitchen, Sanitarium, and heating system operational (R.61(tr.76-77)). Students do not receive vocational credit for their Sabbath duty. Id.; R.69(tr.504-05).

R.69(tr.536,562-63)).[5] Half of the students perform vocational work in the morning, and the other half in the afternoon. Some students are scheduled to work before 7 a.m. and after 7 p.m. See, e.g., R.68,D.Exh.1-3 (Laurelbrook Food Service standardized training and instruction forms ("STIF"s) for kitchen staffing titled "Time Management A.M.", STIF Codes 007-1 and 007-11, require "trainees" to report to work before 7 a.m.);App.140,161.

Students have been injured while working in the vocational program. Accident reports show that children were injured while working with a saw, in the boiler room and Sanitarium, and while logging and hay baling. See, e.g., R.68,P.Exh.11 (Accident Medical Expense insurance forms) at 2 ("Log fell on finger."); 3 ("A rock slipped."); 7 (injured when retrieving "piece of slab" from saw blade; "got thumb too close to teeth and teeth cut end of finger"); 8 (injured by "falling log"); 9 (hurt arm while baling hay); and 11 (injured while checking the boiler); R.68,P.Exh.46 (emergency room injury report of 14-year-old youth who smashed his finger in the wood splitter);App.27-31,74-75.

5. Laurelbrook assigns six full-time adult staff members to the Sanitarium: two to housekeeping, one to laundry, two to the kitchen, and one to maintenance (R.61(tr.54-56)). Wellman Nurse Staffing, a company that is owned and operated by Keith

[5] Prior to the preliminary injunction entered in this case, students worked six hours on Fridays (R.69(tr.563); see R.68,P.Exh.41 (girls' vocational training records);App.71).

Wellman, a member who sits on the Laurelbrook board of directors, provides professional staff, such as a dietary supervisor, registered nurses ("RN"s), licensed practical nurses ("LPN"s), and certified nursing assistants ("CNA"s), to the Sanitarium on a contract basis (R.60(tr.356)). Wellman does not supply laundry or housekeeping staff (R.61(tr.54)). Laurelbrook students perform direct patient care in the nursing home as CNA "trainees" (R.61(tr.191-93);R.70(tr.771)). Students' vocational work at the Sanitarium continues even after they receive their CNA license, which they are eligible to receive at age 16 (R.61(tr.189-90);R.60(tr.369-70); R.68,P.Exh.23 (application for Laurelbrook CNA training);App.44-48). Student CNAs have little direct supervision; they usually see the charge nurse only before or after rounds (R.61(tr.191-92)). Keith Wellman testified that the goal is to have student CNAs work the same job an adult would work (R.60(tr.405)).

The state requires long-term care facilities to meet certain dietary and food safety standards, as well as sanitary standards, and to maintain sufficient staffing to ensure responsiveness to patient needs on a 24-hour basis. See, e.g., R.68,P.Exh.21 (State Operations Manual for state inspections of Medicaid facilities) at 4-6,8-9;App.37,41. Laurelbrook also is required to submit a survey of hours worked by its Sanitarium staff to maintain its nursing home licensing. Student CNA hours

are included in this report (R.68,P.Exh.22 (Laurelbrook Nursing Home Licensure Checklist) at 56; R.68,D.Exh.38 (same); App.43,175;R.60(tr.366,412-13)). State licensing and Medicaid requirements require Laurelbrook to hold regular in-service staff meetings (R.60(tr.376-77)). Student CNAs attend these meetings, and their signatures are recorded on the required in-service reports (R.68,P.Exh.55,66 (Sanitarium in-service records);App.82-91,102-106). These in-services cover general facility requirements and patient care, which all staff, including contract nurses, are required to follow. See, e.g., R.68,P.Exh.66 at 2 ("A.M. Get up list"); 4 ("Vandalism fine"); 7 ("Parking policy"); 35 ("Incident Reports");App.103-106. Further, checklists such as the Mopping Checklist, see infra, are completed to make sure that Laurelbrook is maintaining the health standards required for state certification (R.60(tr.381)).

Students also are assigned to work in the Sanitarium in food preparation and service, laundry, general maintenance, ground maintenance, and housekeeping. The nursing home kitchen operates two shifts, staffed by one adult supervisor and four students (R.68,D.Exh.1-3 (STIF Code FOOD-007-1 to 007-14);App.140-170). A Wellman nursing employee is the kitchen supervisor and dietary coordinator for the nursing home, and supervises students who work in the kitchen (R.70(tr.708)). At

the time of the trial, that individual was not certified in dietary management and did not hold an EASEA or State of Tennessee education certificate. Id. at tr.703,726. The nursing home kitchen prepares meals each day for up to 46 patients, 6 to 10 staff members, and students working at the nursing home. Id. at tr.706. Students in the nursing home kitchen chart patient food consumption, prepare food for patients and staff, store food not consumed, and clean and organize the kitchen (R.68,D.Exh.1-3 (STIF Codes for Sanitarium Kitchen Trainees) (see "FOOD-007-11" for an example of duties assigned to one Sanitarium kitchen trainee); R.68,P.Exh.61 (Laurelbrook kitchen guidelines) at 40);App.99-101,161-162). The nursing home kitchen is subject to compliance with state regulations regarding nursing home operations, which require, inter alia, sufficient staffing of the facility to ensure the preparation and serving of "nutritionally adequate meals at proper temperatures." See, e.g., R.68,P.Exh.21 (State Operations Manual for Department of Health and Human Services inspection) at 8;App.40. Prior to the entry of the preliminary injunction in this case, students in the kitchen were instructed in the use of Hobart mixers and grinders, and used them to prepare food (R.68,P.Exh.61 (Laurelbrook kitchen guidelines) at 50;App.101).

Sanitarium housekeeping duties include buffing the floors, emptying the garbage, disinfecting the rooms, wiping down counters, and making the beds. A "Mopping Checklist," for example, directs students to dust, empty garbage, change toilet paper, and clean toilets (R.68,P.Exh.25;App.49). See R.68,D.Exh.1-2 (Laurelbrook course outlines) (STIF ENVI-025 lists "extra" cleaning to be done one day each week);App.137-139. Students clean patient rooms during four- to eight-hour shifts (R.68,P.Exh.13 (student transcript records) at 012; R.61(tr.186-87);App.35). There is only one adult assigned to work in the housekeeping department, and that individual works as the housekeeping supervisor (R.61(tr.186-87)). A former student testified that it took a few weeks to learn how to clean a room at the nursing home. Id. at tr.241. The boys' Sanitarium training schedule shows that one student is assigned a "Mop" shift every Sunday for over four hours, from 7:30 a.m. to noon (R.68,P.Exh.27 at 1,4,6;App.50-52). One former student testified that there was limited supervision of students' cleaning work, and that a supervisor would check in periodically during the shift (R.61(tr.241)). Another former student testified that students were given a section of 8-10 rooms, which they worked on independent of adult supervision, and "[i]t was our responsibility to make sure the . . . patient rooms were clean, floors and beds and everything else." Id. at tr.186-87.

That student also stated that an adult checked the work only "periodically." Id. at tr.187. Adults did not clean the rooms unless students were not available. Id. The Sanitarium also provides laundry service for all of its patients. Laundry duty lasted an entire vocational rotation, and included gathering dirty linens and clothing, as well as washing, drying, and folding them. Id. at tr.200,203. The laundry is staffed by one adult supervisor and three or more student workers (R.68,P.Exh.58 (laundry in-service records);App.92-98;R.61(tr.200)).

6. Laurelbrook students also work in a number of other capacities. Female students work in the day care facility and elementary school as part of their vocational rotations (R.68,P.Exh.7 (Laurelbrook school handbook) at 4, R.68,P.Exh.29 (girls' vocational training schedules) at 3;App.13,69-70). Students are assigned to duties on the Laurelbrook farm, which provides produce for the nursing home kitchen, school kitchen, and Laurelbrook members; the produce also is sold to the general public (R.61(tr.58-61);R.69(tr.553,587-88)). During the investigation period, students worked 16-hour days baling hay during hay season, and students under the age of 16 operated tractors (R.61(tr.250,256-58)). Male students work in groundskeeping and landscaping services, which entail lawn mowing and weed whacking around the Laurelbrook campus

(R.61(tr.252-53); R.69(tr.600-02,604-07,614)); see R.68,D.Exh.1-1 (mowing the lawn corresponds to STIF code "Grounds Management");App.130-134. The grounds vocational work assignment also includes garbage pickup (R.61(tr.52)). Garbage collection is performed by one adult, assisted by a number of male students, who hang on to the back of the garbage truck to pick up garbage cans along the route (R.61(tr.247-49)). Garbage collection is a full vocational assignment that lasts for the duration of the rotation. Id. at tr.248.

Before the district court granted the preliminary injunction in this case, boys as young as 14 worked six-hour shifts in the boiler room that produces heat for the campus, shoveling coal and wood into open fire furnaces, without adult supervision (R.68,P.Exh.13 (transcript records); R.68,P.Exh.27 (boys' vocational training schedules); R.68,P.Exh.68 (boiler watch training checklist);App.34-35,53-67,107;R.61(tr.179-81,225);R.69(tr.515-20)). Students who work in this vocational assignment refer to each other as "boiler boys." See R.68,P.Exh.68;App.107. The boiler training is conducted around-the-clock: students are slated to fill shifts in 6-hour increments: midnight to 6 a.m.; 6 a.m. to noon; noon to 6 p.m., and 6 p.m. to midnight (R.68,P.Exh.69 (boiler training schedule);App.108). One former student testified that when boys tended the boiler at night, they "were told to stay in the

boiler room" (R.61(tr.182)). A changeover of boiler boys takes place only when the incoming boiler boy has walked through the boiler room with the outgoing boiler boy and is satisfied with the boiler room conditions; the outgoing boiler boy must be signed off by either the incoming boiler boy or the training supervisor (R.68,P.Exh.68;App.107). In the fall, winter and spring, boys often work more than one day a week in the boiler room (R.68,P.Exh.27 (boys' vocational schedules) at 9-23; R.68,P.Exh.28 (vocational codes; "BO" designates "boiler" duty);App.53-68;R.61(tr.215);R.69(tr.515-521);R.70(tr.684)). Boys operating the boiler are required to remove residue from burning coal from the active fire bed. If they are not removed in a timely fashion, the clinkers burn into a solid mass, which requires the youth to turn the boiler off, climb into the fire bed, and break up the clinkers with a hammer (R.61(tr.101,181-82);R.70(tr.667-69,685)). As one staff member testified, clinkers are taken out of a live fire by using an iron poker: "[W]e slide the poker along the bottom of the fuel bed and get underneath the clinker, turn it over, and then we get it up on top of the fire, and we take it out the boiler door with a rake" (R.70(tr.662)). Charles Hess, president of the Laurelbrook corporation and principal of the Laurelbrook secondary school, and Fred Douville, Laurelbrook's vocational training director, testified that the boys request the boiler room assignment

because it is work that they enjoy (R.61(tr.150);R.69(tr.540-41)). And, another staff member testified that he did not see any harm in permitting students to continue doing this work (R.70(tr.693)).

Male students also are assigned to logging crews that work at felling trees. Although an adult usually assigns the work, adults are not always present while the youth are working in the woods (R.61(tr.174-80)). After gathering wood, students help to haul it to a wood splitting area, and use mauls and a gas-powered wood splitter to split the wood, which is used by the members in their homes, and in the boiler room (R.68,P.Exh.47 at 51,53-56;App.77-81;R.61(tr.104-108,247);R.69(tr.618-21)). Boys deliver the split wood to members' homes (R.61(Tr.251-52)). One boy was injured using the wood splitter (R.68,P.Exh.46 at 8;App.75; R.70(Tr.862,864)). Boys under the age of 16 also use heavy machinery in conjunction with the logging and farming, including tractors, skid steers, and bulldozers (R.68,P.Exh.9 at 60;App.17;R.61(Tr.183-85,250-51)).

One member on the Laurelbrook board of directors owns and operates a sandstone quarry located in part on the Laurelbrook property. Male students work on quarry property filling holes in the road (R.61(tr.260-61)). Laurelbrook manufactured wood pallets and sold them to the sandstone quarry operation (R.61(tr.185);R.71(tr.884,886)). Students worked in the wood

pallet factory as part of their vocational rotation (R.61(tr.74-75,185,259-60)). They assisted in the manufacture of the wood pallets by helping to place wood into a form and nailing it into place (R.61(tr.259-60)). Students used a table saw to cut the wood. Id. The sales for pallets were $64,000 in 2005; $104,000 in 2006; and $41,000 in 2007 (R.68,P.Exh.82 at 19,49;App.113-114). Laurelbrook suspended pallet production in part because of the Department of Labor's ("Department") litigation in the instant case (R.68,P.Exh.10 (Laurelbrook EASEA materials) at 303;App.25).

In October 2006, Laurelbrook replaced the roof on the vocational arts building with the help of a former student who owns a professional roofing company (R.72(tr.1090,1096)). Staff and students worked on the Laurelbrook building without "fall protection," and helped to remove old roofing tiles, lay new roofing shingles, and do "helper" work on the ground while the roofing was in progress (R.69(tr.547,558-59);R.72(tr.1108-10)). During the roofing project, students helped to use a metal press to shape the new gutters, by removing metal from the press (R.69(tr.546-47);R.72(tr.1110)). Students also performed other roofing projects while enrolled at Laurelbrook (R.61(tr.264-67)). They worked on different construction projects as well, laying block, cutting board, mixing concrete, and laying scaffolding. Id. at 245-46.

7. Tennessee public high schools designate vocational education courses as electives, not required core courses (R.71(tr.1049)). Work-based learning (entailing the performance of specific jobs) must be done in conjunction with the vocational "cluster" in which the student is enrolled, such as agriculture, health science, business, or trade and industry. Id. at 1012,1039. The vocational learning must be "progressive" as to the degree or level of complexity -- thus, a student's vocational education must build upon knowledge the student attained the previous year in the same subject. Id. at 1027,1039. These classes must be conducted under close supervision. Id. at 1032-34. Tennessee uses six criteria, which track those followed by the Department, to assess whether a trainee is an employee, e.g., whether the student's productivity is offset by the burden on the employer to instruct the student, and whether the student has displaced a regular employee (R.68,P.Exh.83 (Tennessee Department of Education publication titled "Work-Based Learning Policies, Procedures, and Resources") at 67;App.129). See infra. Students are not permitted to return to the same job once they have learned how to perform a certain task, because repetition suggests that the learning has ended and work has begun; rather, they go on to learn the next subject designated by the "progressive" learning scheme (R.71(tr.1078-79)). Work-based learning can only be

conducted pursuant to an extremely detailed individual training agreement and an individualized training plan, which requires, inter alia, that students perform hazardous work only intermittently and under the direct and close supervision of an experienced and qualified person (R.68,P.Exh.83 at 11,37-46;App.118-128).

8. The Wage and Hour Division ("WHD") commenced an investigation of Laurelbrook after receiving a complaint that a child was performing roofing work at the institution without "fall protection." WHD concluded that the school was employing youth in violation of the child labor provisions of the FLSA, and the Secretary filed suit in federal district court seeking injunctive relief (R.1,2). First, the Secretary alleged that Laurelbrook was violating the child labor time and hours standards by permitting youth under the age of 16 to work during school hours, more than three hours on a school day and 18 in a school week, more than eight hours a day when school was not in session, and before 7 a.m. and after 7 p.m. See 29 C.F.R. 570.35(a). The Secretary also alleged that Laurelbrook violated the child labor occupations standard when it permitted youth under the age of 16 to work in the boiler room. See 29 C.F.R. 570.34. Further, the Secretary alleged that Laurelbrook employed youth in violation of various hazardous occupations orders ("HO"s) when it permitted youth under the age of 18 to

engage in more than incidental driving of garbage trucks or act as an outside helper (HO 2, 29 C.F.R. 570.52); split wood using anything other than a froe or mallet, or assist in the operation of a wood splitter (HO 4, 29 C.F.R. 570.54); use a nail gun in pallet production (HO 5, 29 C.F.R. 570.55); assist with a metal-forming machine used to make gutters (HO 8, 29 C.F.R. 570.59); operate power-driven bakery machines in the Sanitarium kitchen (HO 11, 29 C.F.R. 570.62); operate circular saws and band saws (HO 14, 29 C.F.R. 570.65); and perform work on or about a roof (HO 16, 29 C.F.R. 570.67). Finally, the Secretary alleged that Laurelbrook employed youth in violation of the agricultural child labor regulations when it permitted students under the age of 16 to, among other things, operate tractors and other machinery. See 29 C.F.R. 570.71.

9. On April 30, 2007, Laurelbrook and the Department entered into an agreed-upon preliminary injunction, whereby Laurelbrook, while not admitting to FLSA coverage or violations, agreed not to expose students to violations of certain child labor rules and regulations in its operation of its vocational training program (R.21,22). The preliminary injunction provided that Laurelbrook was "preliminarily enjoined until such time as a final order or decree is entered in this matter" from violating the FLSA as detailed in the injunction. Id.

B. The District Court's Decision

The district court conducted a seven-day bench trial between August 19, 2008 and April 6, 2009. On July 15, 2009, the district court issued a memorandum decision and order that denied the Secretary's request for permanent injunctive relief and entered judgment for Laurelbrook. See Solis v. Laurelbrook Sanitarium & Sc., Inc., No. 1:07-cv-30, 2009 WL 2146230 (E.D. Tenn. 2009). The court's decision turned on its determination that Laurelbrook students are "trainees," not employees, for purposes of the FLSA. See Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). In support of this conclusion, the court found that Laurelbrook is a "bona fide" school; that the Sanitarium exists only as a means of educating Laurelbrook students, thus precluding a finding that students displaced adult workers; and that students receive vocational training similar to that received in a state vocational program. See 2009 WL 2146230, at *1-3. It further found that the students are adequately supervised in the use of hazardous equipment; are not entitled to a job after graduation; and that the school, although it unquestionably receives some benefit from the students' work, provides "important tangible and intangible training to its students," from which the students reap "great benefits." Id. at *3. Thus, the court concluded, "[a]lthough there is benefit to the school and Sanitarium from the students'

activities, the totality of the circumstances shows that the primary benefit is to the students, who learn practical skills about work, responsibility, and the dignity of manual labor in a way consistent with the religious mission of their school." Id. at *7. The earning of some revenue from the "work" performed by the students, according to the court, did not render Laurelbrook a commercial enterprise. Id.

SUMMARY OF ARGUMENT

1. Reversal of the district court's decision denying the Secretary's request that the court enjoin Laurelbrook from violating the child labor provisions of the FLSA is warranted, because the district court incorrectly construed and applied the Portland Terminal factors, which determine whether a trainee is an employee for purposes of the FLSA, to the facts of this case as revealed by the record in its entirety. The district court thus erred as a matter of law in concluding that the students are not employees under the FLSA.

The determination that a trainee is not an employee for purposes of the FLSA is warranted only when all six Portland Terminal factors are met. See Wage and Hour Division Field Operations Handbook (1993) ("FOH") ¶10b11(b). The proper application of the Portland Terminal factors to the facts of this case as revealed by the record as a whole show that Laurelbrook cannot establish any of these factors with respect

to its students working in its vocational training program: Laurelbrook's vocational training is not similar to a recognized vocational program because it focuses primarily on menial tasks that do not require meaningful training and lacks, inter alia, proper supervision, rotation, progressive training, and safety instruction; the benefit of the training inures to Laurelbrook rather than to the students because the students perform productive work for the school and because the vocational training program is deficient in the areas identified above; Laurelbrook students displace regular employees; Laurelbrook students, because they work independently, do not impede Laurelbrook's operations but instead provide a significant benefit; Laurelbrook students frequently return to Laurelbrook after they graduate to work for the organization; and Laurelbrook students, because they receive scholarships that are in direct proportion to the hours worked, receive "wages" for purposes of the FLSA. Therefore, the correct application of the six Portland Terminal factors to the facts of this case establishes that the Laurelbrook students are employees for purposes of the FLSA.

2. Moreover, the Secretary established as a matter of law the factors required to impose a permanent injunction under the Act. The need for an injunction has been found to be particularly compelling when child labor violations are at

issue. See Shultz v. Salinas, 416 F.2d 412, 414 (5th Cir. 1969). This Court has held that it is an abuse of the trial court's discretion not to grant an injunction in an FLSA case where there has been a "clear violation of the statutes and regulations," and there is no assurance that the offending party will voluntarily comply in the future. Wirtz v. Flame Coal Co., 321 F.2d 558, 560 (6th Cir. 1963); see Reich v. Petroleum Sales, Inc., 30 F.3d 654, 657 (6th Cir. 1994). Here, Laurelbrook violated the Act -- the child labor violations in this case were largely uncontested, and there is no evidence refuting the existence of violations (given an employment relationship). Moreover, testimony by the Laurelbrook president established that Laurelbrook has no intent to comply with the Act in the future. Therefore, entry of a permanent injunction against Laurelbrook is warranted.

ARGUMENT

APPLYING THE CORRECT LEGAL STANDARD TO ALL THE RELEVANT FACTS OF RECORD, WHICH THE DISTRICT COURT FAILED TO DO HERE, INEVITABLY YIELDS THE CONCLUSION THAT LAURELBROOK STUDENTS ARE EMPLOYEES FOR PURPOSES OF THE FLSA BECAUSE THEY DO NOT MEET ANY OF THE SIX PORTLAND TERMINAL FACTORS; APPLYING THE PROPER LEGAL STANDARD TO THE RECORD EVIDENCE ALSO SHOWS THAT A PERMANENT INJUNCTION WAS WARRANTED AS A MATTER OF LAW

A. Standard of Review

This court reviews a district court's decision to grant or deny a request for the issuance of a permanent injunction under "several different standards." Secretary of Labor v. 3Re.com,

Inc., 317 F.3d 534, 537 (6th Cir. 2003). Whether or not a district court properly denied or granted injunctive relief is ultimately reviewed under an abuse of discretion standard. See, e.g., Reich v. Petroleum Sales, Inc., 30 F.3d 654, 656-57 (6th Cir. 1994). As part of that review, a district court's legal conclusions are reviewed under a de novo standard, and its underlying findings of fact are subject to the clearly erroneous standard of review. See 3Re.com, Inc., 317 F.3d at 537. A district court's factual findings are clearly erroneous if, "based on the entire record," the reviewing court is "left with the definite and firm conviction that a mistake has been committed." Shelby County Health Care Corp. v. Majestic Star Casino, 581 F.3d 355, 364-65 (6th Cir. 2009) (internal quotation marks and citations omitted). This Court has stated in the context of an FLSA case that, although it still reviews the district court's underlying findings of fact for clear error, it reviews de novo "'the district court's application to those facts of the legal standards contained in statutes, regulations, and caselaw.'" 3Re.com, Inc., 317 F.3d at 537 (quoting Brock v. City of Cincinnati, 236 F.3d 793, 800 (6th Cir. 2001)).

This Court need not review the district court's denial of a permanent injunction under an abuse of discretion standard, because the district court in this case did not exercise its discretion; it did not assess whether an injunction was proper

based on the alleged child labor violations, but rather denied the Secretary's request for injunctive relief on the ground that the Laurelbrook students were not employees subject to the FLSA. As explained infra, it is the Secretary's position that the district court incorrectly construed and applied the legal test for determining employee status under the FLSA,[6] and that the proper application of the correct legal tests to the largely undisputed facts of record in this case shows as a matter of law that the students were employees and that a permanent injunction should have issued.

B. The Child Labor Provisions of the FLSA

1. Section 12(c) of the Act, 29 U.S.C. 212(c), prohibits the employment of "oppressive child labor," which is defined to include nonagricultural employment under the age of 16 in any occupation, and employment between the ages of 16 and 18 in any occupation that the Secretary has declared to be "particularly hazardous for the employment of children between such ages or detrimental to their health or well-being." 29 U.S.C. 203(l). This Court has remarked that "an employer's responsibility for child labor violations approaches strict liability." See Martin v. Funtime, 963 F.2d 110, 115 (6th Cir. 1992) (citation omitted). An employer cannot guard against violations of the

[6] The determination of employee status under the FLSA is a question of law. See, e.g., Reich v. Stewart, 121 F.3d 400, 404 (8th Cir. 1997).

child labor provisions of the FLSA by disclaiming knowledge of the violations or adopting policies that facially bar children from engaging in violative acts. Id.

Notwithstanding the Act's sweeping prohibition of nonagricultural labor for youth under the age of 16, section 3(l) authorizes the Secretary to promulgate regulations permitting these youth to work "if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being." 29 U.S.C. 203(l). Pursuant to this authority, the Secretary promulgated Child Labor Regulation No. 3 ("Reg. 3"), see 29 C.F.R. 570.31 et seq., which permits 14- and 15-year-old children to work in certain occupations in retail, food service, and gasoline service establishments. Any work not specified in the regulations as work that 14- and 15-year-olds can perform, is prohibited. This regulation permits 14- and 15-year-olds to work only outside of school hours for the school district in which they reside; for not more than three hours a day and 18 hours in a week when school is in session; for not more than eight hours a day and 40 hours in a week when school is not in session; and only between 7 a.m. and 7 p.m. in any day, except during the summer (defined as from June 1 through Labor Day) when the evening hour is 9 p.m. See 29 C.F.R. 530.35(a).

The Secretary also has statutory authority to prohibit certain work for 16- and 17-year-olds that she has determined to be hazardous. See 29 U.S.C. 203(l). Pursuant to this authority, the Secretary has issued 17 HOs. See 29 U.S.C. 203(l); 29 C.F.R. 570.50-.68. These HOs reflect the Secretary's determination that the work specified in the HO is "particularly hazardous" for youth aged 16 to 18 or "detrimental to their health or well-being." 29 U.S.C. 203(l). The HOs apply either on an industry basis, prohibiting certain occupations in a particularly industry, or on an occupational basis, irrespective of the industry in which the work is performed.

The employment of youth in agriculture is governed by section 13(c) of the FLSA, which establishes a minimum age of 16 for employment in agriculture in any farm job, including agricultural occupations declared hazardous by the Secretary; those youths 16 and older can work in agricultural jobs at any time, including during school hours. See 29 U.S.C. 213(c). Fourteen- to 16-year-old youth are permitted to work in agriculture outside of school hours, in any agricultural occupation other than those that the Secretary has declared hazardous. See 29 U.S.C. 213(c)(2). Agricultural occupations that the Secretary has declared hazardous for youth under the age of 16 include operating certain tractors, and operating or assisting to operate certain other farm machinery; felling,

skidding, and loading or unloading timber; working from a ladder or scaffold at a height greater than 20 feet; driving while transporting passengers; and handling toxic agricultural chemicals. See 29 C.F.R. 570.71(a).[7]

2. The FLSA's child labor prohibitions are premised on an employment relationship. See 29 U.S.C. 212(c), 203(l), 213(c), 214(d).[8] The Act defines the term "employee" as "any individual employed by an employer." 29 U.S.C. 203(e)(1). An employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. 203(d). "Employ" is defined as "to suffer or permit to work," 29 U.S.C. 203(g), thereby giving the term "employ" a scope that

[7] The Secretary's regulations provide limited student-learner and apprenticeship exemptions from the general restrictions applicable to the employment of minors between the ages of 14 and 16, see 29 C.F.R. 570.35a, and those pertaining to occupations particularly hazardous for the employment of minors between the ages of 16 and 18, see 29 C.F.R. 570.50(b) and (c). As described infra, stringent registration, instructional, and supervisory requirements must be met in order to qualify for these student-learner and apprenticeship exemptions.

[8] Section 14(d) of the FLSA, 29 U.S.C. 214(d), permits the Secretary to provide by regulation or order that the Act's minimum wage and overtime provisions will not apply to the employment of students by an elementary or secondary school if the students' work is an "integral part" of their regular education program, and conducted "in accordance with applicable child labor laws." The Secretary has not promulgated any regulations or orders pursuant to section 14(d) permitting such work. Wage and Hour's FOH, however, reflects the Administrator's nonenforcement policy regarding wages for students' work provided the work is conducted in accordance with the child labor regulations. FOH ¶10b26(a); see Reich v. Shiloh True Light Church of Christ, No. 95-2765, 1996 WL 228802, at *3-4 (4th Cir. May 7, 1996) (85 F.3d 616 (Table)).

is the "broadest . . . that has ever been included in any one act." U.S. v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (internal quotation marks and citation omitted).

C. A Trainee's Employee Status Under the FLSA is Measured by the Six *Portland Terminal* Factors

1. The seminal case addressing whether trainees are employees entitled to the protections of the FLSA is Walling v. Portland Terminal Co., 330 U.S. 148 (1947). In Portland Terminal, the railroad gave prospective brakemen a practical course of training that typically lasted seven or eight days. The trainees did not displace any of the regular employees. Nor did their work expedite the railroad's business; at times, it actually impeded it because, in addition to their normal duties, the regular employees had to closely supervise the trainees. The trainees did not receive compensation during their training period other than a retroactive $4.00 per day allowance, contingent upon successful completion of the training. See id. at 149-50. Based on "unchallenged findings . . . that the railroads received no 'immediate advantage' from any work done by the trainees," the Supreme Court held that the trainees were not employees within the meaning of the FLSA, and therefore were not entitled to be paid the minimum wage. Id. at 153. The Court recognized that "the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation." Id. at 151. The Supreme Court,

however, determined that Congress did not intend the phrase "suffer or permit to work' . . . to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." Id. at 152.

After Portland Terminal, WHD identified six criteria to determine whether a trainee is an "employee" for purposes of the FLSA. See Employment Standards Admin., U.S. Dep't of Labor, *Employment Relationship Under the Fair Labor Standards Act*, WH Pub. 1297 (Rev. May 1980), available at http://www.osha.gov/pls/epub/wageindex.download?p_file=F11973/WH1297.pdf; FOH ¶10b11(b). These factors are:

> (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
> (2) the training is for the benefit of the trainees or students;
> (3) the trainees or students do not displace regular employees, but work under their close observation;
> (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
> (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
> (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

WH Pub. 1297 at 4-5. The Department's longstanding position is that all six criteria must apply before the agency will consider that a youth engaged in a career education program is not an

employee for purposes of the FLSA. See FOH ¶10b11(b); U.S. Dep't of Labor Opinion Letter (Op. Ltr.) FLSA2006-12, 2006 WL 1094598 (Apr. 6, 2006); Op. Ltr. FLSA2002-8, 2002 WL 32406598 (Sept. 5, 2002); Op. Ltr., 1998 WL 1147717 (Aug. 11, 1998); Op. Ltr., 1986 WL 1171130 (Mar. 27, 1986); Op. Ltr., 1975 WL 40999 (Oct. 7, 1975); see also Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504, 532-33 (S.D.N.Y. 1998) (Sotomayor, J.) (Wage and Hour test does not rely exclusively on a single factor). WHD also has stated that whether all six criteria are satisfied in a particular case will depend "upon all the facts and circumstances surrounding the activities of the trainee on the premises of the establishment at which the training is received." FOH ¶10b11(b); Op. Ltr., 1975 WL 40999 (Oct. 7, 1975).

2. The Department's interpretation of the Act's definition of "employee," as reflected in its publication, opinion letters, the FOH, and this brief, is entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134 (1944). See Federal Exp. Corp. v. Holowecki, 128 S. Ct. 1147, 1151 (2008) (deference for EEOC's statutory interpretation embodied in policy statements contained in compliance manual and internal directives). Several courts have deferred to the Department's test. See, e.g., Atkins v. General Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (giving "substantial deference" to WHD's six-factor test);

Donovan v. American Airlines, Inc., 686 F.2d 267, 273 n.7 (5th Cir. 1982) (applying WHD's six-factor test derived from its interpretation of Portland Terminal); Archie, 997 F. Supp. at 532 (concluding that the WHD six-part test is a reasonable application of the FLSA and Portland Terminal); but see Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027-28 (10th Cir. 1993) (using six-factor test but concluding that the test does not require all six factors to be met; rather, the factors should be used to assess the totality of the circumstances); cf. McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989) (applies facts, such as the nature of the instruction involved, to determine the "relative degrees of benefit" at issue in the case, which it uses as the ultimate criterion to determine employment status).

3. This Court has determined, in similar circumstances to those presented in the instant case, that purported trainees are employees for purposes of the FLSA. In Marshall v. Baptist Hospital, Inc., this Court agreed with the district court's conclusion that the clinical training portion of an x-ray technician program administered by a hospital was not a bona fide vocational educational program, because the students displaced regular employees; the training of the students was deficient; and the hospital received the direct and substantial benefit of the trainees' work. 668 F.2d 234, 236 (6th Cir.

1981) (citing Marshall v. Baptist Hosp., Inc., 473 F. Supp. 465 (M.D. Tenn. 1979)).[9] Baptist Hospital involved an x-ray technician training program where trainees were assigned to the hospital for on-the-job clinical training. 473 F. Supp. at 471-72. In the course of this clinical training, trainees were intended to observe x-ray technologists in the performance of given procedures with the goal of being able to perform the procedures themselves under the direct supervision of the technologists. Id. at 472. In practice, however, many of the procedures were easy to learn and a number of x-ray rooms were staffed solely by trainees. Id. The trainees were regularly reassigned to rooms where they were most needed. Id. New trainees were sometimes taught by more experienced trainees. Id. Additionally, trainees spent much of their time doing clerical work and other routine hospital chores rather than learning. Id. at 472-73. This Court noted that students were not adequately supervised, were not regularly rotated between departments, and spent a substantial amount of time engaged in

[9] The dispositive question before this Court was whether the hospital could invoke the good faith defense under the Portal-to-Portal Act, 29 U.S.C. 259, which provides that WHD may not subject an employer to liability if the employer has relied in good faith on any written administrative regulation, order, or interpretation of the agency. See Baptist Hosp., 668 F.2d at 237-38. Although this Court agreed with the district court findings of fact and "test of liability under the FLSA" as applied to the hospital's vocational program, it ultimately concluded that the hospital had a valid Portal Act defense based on a specific FOH discussion of x-ray technicians. Id.

routine activities that had peripheral, if any, value to their x-ray technology training. Baptist Hospital, 668 F.2d at 235-36. Therefore, it was "beyond question" that the hospital "received direct and substantial benefit from the work performed by trainees, work that would otherwise have been done by regular employees and work for which the hospital charged patients at full rates." Id. at 236 (quoting Baptist Hosp., Inc., 473 F. Supp. at 476) (internal quotation marks omitted).

In Archie, the district court also used WHD's six-factor test to conclude that formerly homeless and jobless individuals who participated in a not-for-profit corporation's job training program, which itself provided services for nonprofit entities, were not trainees but employees under the FLSA. See 997 F. Supp. at 532, 536-37. In reaching this conclusion, the court relied on facts that the so-called "trainees'" time was kept on time sheets, and that they worked double and overtime shifts; were placed on payroll; were in the program for an indefinite period of time; performed tasks similar to staff employees and often filled in for full-time staff; frequently worked unsupervised; were not trained in a similar manner to those trained at a vocational school; and raised money for the nonprofit by virtue of the work performed. Id. at 533-35. Based on these facts, the court concluded that the corporation had not created a true training program, "as that concept is

understood in case law and regulatory interpretations," but a program that required participants to do work that "had a direct economic benefit" for the corporation. Id. at 507-08. Thus, even though the program provided the participants with "some meaningful benefits," the court concluded that plaintiffs were employees. Id. at 507.

Courts are less likely to find that trainees are employees where the training is similar to that provided by a vocational school, the trainees' work does not provide a tangible benefit to the employer, and the trainees do not displace current employees, all indicia that the training is truly being conducted for and inures to the benefit of the trainee. In Reich v. Parker Fire Prot. District, 992 F.2d 1023 (10th Cir. 1993), for example, the Tenth Circuit affirmed the district court's determination that time spent by firefighter trainees at training academy was not compensable. Although the court applied WHD's six-factor test, it did not agree with the Secretary's position that all six factors must be met (for nonemployee status), concluding that the factors are meant to assess "the totality of the circumstances." Id. at 1026-27. The court found that the fire department's training curriculum overlapped significantly with what would be taught in any fire fighting academy, and that even though the training program emphasized the prospective employer's particular policies, it

was nonetheless comparable to vocational school because it taught skills that were fungible within the industry. The court concluded that because trainees did not assume the duties of career firefighters, and did not displace current employees, their presence did not obviate the need for qualified firefighters and paramedics, and "in that respect defendant received no benefit." Id. at 1029-30.

Likewise, in Atkins v. General Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983), the Fifth Circuit held that individuals who completed a course that instructed them how to work on a General Motors ("GM") headlight assembly line were not employees. Although the court stated that WHD's six-part test was entitled to "substantial deference," the court's primary focus was on the fourth factor -- whether GM derived an immediate benefit from the trainees' work. Id. The training course consisted of classroom instruction and hands-on training. Id. at 1127. As part of the hands-on training, the individuals were required to assemble and reassemble equipment, and to clean the equipment and surrounding area. Id. The record showed, however, not only that GM had employees on hand to do the work arguably done by the trainees, but that the trainees damaged the equipment, requiring the regular employees to redo the trainees' work. Id. at 1128-29. Therefore, the court concluded that the trainees did not displace regular employees and that their work

did not benefit GM. Id.; see Donovan v. American Airlines, Inc., 686 F.2d 267 (5th Cir. 1982) (flight attendant and sales agent trainees for airline did not displace regular employees; therefore, the training, which qualified them for employment, inured primarily to their benefit).

D. Proper Application of the *Portland Terminal* Test to Laurelbrook's Vocational Training Program Establishes that the Students are Employees for Purposes of the FLSA

1. As an initial matter, the district court erred when it concluded that this Court has adopted a primary benefit test to determine whether student trainees are employees for purposes of the FLSA. The district court stated that this Court's decision in Walling v. Nashville, C. & St. L. Ry., 155 F.2d 1016, 1018 (1946), aff'd, 330 U.S. 158 (1947), which agreed with the reasoning of the Fifth Circuit in Walling v. Jacksonville Terminal Co., 148 F.2d 768, 770 (5th Cir. 1945), "implie[d]" that this Court would follow a primary benefit test in determining whether an individual is an employee or trainee. Laurelbrook, 2009 WL 2146230, at *5. This is plainly incorrect, because this Court's decision in Nashville and the Fifth Circuit's opinion in Jacksonville were both superseded by the Supreme Court's decision in Portland Terminal, which set forth six factors for determining whether trainees are employees for purposes of the FLSA. Nashville was a companion case to Portland Terminal before the Supreme Court, and incorporated

that decision's six-factor analysis. See 330 U.S. at 158, 160. The district court further erred when it stated that this Court adopted the primary benefit test in its Baptist Hospital opinion, because that decision validated the test of liability utilized by the Baptist Hospital district court, which looked at several of the Portland Terminal factors in addition to primary benefit, including whether regular employees were displaced, and whether the training program was a genuine vocational training program with sufficient classroom training, supervision, educational experiences, and rotation. See Baptist Hosp., Inc., 473 F. Supp. at 473-77, rev'd on other grounds, 668 F.2d at 235.

2. In addition to its erroneous reliance on one, rather than all six, of the Portland Terminal factors, the district court erred as a matter of law in its analysis of the primary benefit factor. See infra. In fact, the proper application of all six Portland Terminal factors, as they have been construed uniformly by WHD, to the facts of this case, compels the conclusion that the Laurelbrook students are employees for purposes of the FLSA.

The first Portland Terminal factor asks whether "the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school." FOH ¶10b11(b)(1). The district court found that Laurelbrook's vocational training is a "bona

fide program" that "compares favorably to vocational programs operated by public high schools in the area," and that Laurelbrook is "an approved and accredited school of the State of Tennessee Department of Education." 2009 WL 2146230 at *2, *4 (FOF 18, 54).

The record is clear, however, that Laurelbrook's vocational training program does not incorporate even the most fundamental elements of a state vocational program. WHD has stated that "[t]o qualify as training" under this factor, "the student's placement should be career oriented and not in an occupation for which no lengthy observation or training is required such as, for example, janitor work or making hamburgers." Opinion Letter, 1975 WL 40999 (Oct. 7, 1975). In Baptist Hospital, therefore, this Court concluded that the hospital's x-ray technician program was educationally deficient in part because the students performed "clerical chores long after the educational value of that work was over." 668 F.2d at 236. Other than the work of the student CNAs, Laurelbrook students' work at the Sanitarium consists almost entirely of kitchen or cleaning work, similar to that of general laborers, which requires little skill or training.[10] Students are required, for

[10] Student CNAs participating in the vocational program, by contrast, perform relatively skilled work in that they are responsible for direct patient care (R.84 (Mem., FOF 36-37)). Although their work is not entirely menial, it is clear that once they receive their CNA license the students are no longer

example, to fold and sort laundry; perform janitorial services at the nursing home; and help in the nursing home kitchen. Outside of the Sanitarium, students are required to prepare and deliver firewood for members' personal use; cut the grass on the Laurelbrook campus; perform general gardening and farming tasks; and shovel coal into furnaces. The district court did not consider the actual nature of the work performed in finding that Laurelbrook has a bona fide vocational training program.

Laurelbrook itself recognized this shortcoming in its vocational training program. A 2006 self-study report prepared by the Laurelbrook staff for EASEA accreditation acknowledged the following "weakness" in the program: "1. Students feel locked into menial responsibilities too long. They have no choice. This is largely due to seasonal responsibilities and low student enrollment" (R.68,P.Exh.10 at 123;App.22).[11] The evidence establishes the menial nature of the tasks performed by Laurelbrook's students, and shows that no meaningful training is required for their completion. Laurelbrook students are required to do lawn mowing and weed whacking on the Laurelbrook campus, work which is performed by maintenance workers in the Rhea County public schools (R.71(tr.1037-38)). Students working

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learning new skills, and that the training aspect of their education has ceased.

[11] Charles Hess chaired the Laurelbrook self-study (R.61(tr.83);R.69(tr.452); R.68,P.Exh.10 (Laurelbrook EASEA materials) at 76-77;App.19-20).

in the Sanitarium kitchen do not determine menus and cannot make decisions about patient diet; they follow specific directions instructing them how to assemble patient trays, and are responsible for emptying trash cans; cleaning the dining room; retrieving dirty dishes; washing the dishes; making tossed salad for staff; emptying the slop bucket; and sweeping. See R.68,D.Exh.1-3 (STIF Code for "Dish 6:30-11:00"(FOOD-007-11);App.163-164). The Tennessee "Culinary Arts III" course, by contrast, requires students to demonstrate competency not only in food production and service, but in billing, wage computation, inventory control, and other management functions such as liability assessment (R.68,D.Exh.38-I;App.176). Similarly, the Tennessee "Health Science Education" course is a holistic course that requires students to demonstrate 39 specific competencies in 10 standards, including how to safely and effectively operate equipment used in facility maintenance; demonstrate effective verbal and nonverbal communication skills; manage biomedical contracts; understand applicable state and federal regulations; distinguish and differentiate between biomedical equipment; and inspect mechanical systems (R.68,D.Exh.38-Q;App.177-178).

State vocational education also is based on progressive learning, which requires students to learn new things each year based on skills and knowledge learned the previous year. See

Opinion Letter, 1996 WL 1005201 (May 1, 1996) ("[T]he [vocational] learning experience is a planned program of job training and work experience for the trainee, appropriate to the trainee's abilities, which includes training . . . to be mastered at progressively higher levels that are coordinated with learning in a school . . . and lead to the awarding of a skill certificate; . . . the learning experience encompasses a sequence of activities that build upon one another, increasing in complexity and promoting mastery of basic skills."). Thus, in McLaughlin v. Ensley, 877 F.2d 1207, 1209-10 (4th Cir. 1989), the court concluded that snack food distributor trainees, who performed during training the same tasks that they would have as employees, were entitled to be paid for that time; the court specifically noted that the training constituted a "very limited and narrow kind[] of learning" that did not rise to the level that one would receive "in a general, vocational course in 'outside salesmanship.'" On the other hand, in a state vocational education program, a student will take a course titled "Culinary Arts I" one year, and the next year enroll in "Culinary Arts II," which builds upon the student's knowledge gained through his or her previous classwork. Laurelbrook's vocational education classes do not incorporate a comparable progressive learning structure.

Tennessee also requires students' vocational work to be conducted in conjunction with their chosen vocational cluster. Although Laurelbrook's written policy states that its students work in one vocational area for nine weeks at a time, the records reveal that this is not its actual practice. Students often work in areas other than their assigned vocational area "as needed" (R.61(tr.197)). Fred Douville acknowledged that transcript records reflect that students work in multiple disciplines on a weekly basis. One student, for example, over the period of one week in December 2006, was on "woods" duty, but also worked shifts in Sanitarium housekeeping and in "academy and general" (R.69(tr.510-11); R.68,P.Exh.44 (monthly transcript record);App.73).[12] Another document, a schedule of work prepared by Douville, shows that a freshman in one particular week worked in Sanitarium cleaning on Sunday, in woodworking on Monday and Tuesday, in general maintenance on Wednesday, and in woodworking on Thursday (R.68,P.Exh.42 (last line);App.72; R.69(tr.512)). That same week, another freshman was assigned to Sanitarium laundry on Monday, woodworking Tuesday to Wednesday, general maintenance on Thursday, and woodworking on Friday (R.68,P.Exh.42 (fourth-to-last

[12] In addition to illustrating the variety of vocational assignments given to this particular student, the exhibit also shows that this student was working more than the six hours that Laurelbrook acknowledged its students were working on Fridays (R.69(tr.511)).

line);App.72; R.69(tr.513-14)). These examples do not evidence vocational training in a student's chosen vocational structure, and show instead that students were often placed in vocational assignments where they were needed to fill a gap in staffing.

Another essential element of vocational education is adult supervision. In Baptist Hospital, for example, evidence that trainees performed work alone or under supervision of fellow trainees prompted this Court to conclude that the training program was "seriously deficient" in supervision, thereby supporting employee status. 668 F.2d at 236. In Archie, the district court, in holding that the individuals in question were not trainees but employees under the FLSA, noted that participants received direct supervision only for the first few days; "[t]hereafter, other than periodic short visits from shift or 'field' supervisors once or twice each shift, they were left alone." 997 F. Supp. at 516. In the present case, the vocational director for the local high school testified that while the state vocational system permits older students to take more of a leadership role in classroom vocational training as their skills progress, the instructor is always present (R.71(tr.1016,1033)). By contrast, the record is clear here that Laurelbrook students worked under the infrequent supervision of staff and Wellman Nursing contract employees. Students on the boiler shift, for example, were in fact given

general instruction by an adult on how to operate the boiler before being assigned that duty (R.61(tr.211-12)). However, students starting a particular boiler shift were given a rundown of the prior shift, from which they understood what steps would be required on their shift, by the students finishing up the last shift. Id. Clifton Brandt, who is on the Laurelbrook staff, testified that once students are proficient enough to do the job on their own, they are allowed to do so (R.70(tr.645-46)). Maudie Westfall, the girls' vocational education coordinator, did not meet with the girls to discuss their vocational assignments; she merely posted the schedule (R.69(tr.570-71)). Further, student CNAs learned what duties needed to be performed on each shift from the student CNAs who were finishing their shifts (R.61(tr.192)). In other words, students were often supervised by other students who, in some instances, were responsible for assigning grades. Id. at 97-98,233.

Tennessee also requires student-learner training conducted outside the classroom to incorporate protections that are virtually identical to the federal child labor student-learner exemption; under that exemption, students aged 16 or older may participate in work-based learning either in a vocational program run by a recognized state or local educational authority or a "substantially similar" private school program, pursuant to

a written agreement providing that any hazardous work done by students will be incidental to the training, conducted for only short periods of time, and performed "under the direct and close supervision of a qualified and experienced person" (R.68,P.Exh.83 (Tennessee Department of Education publication titled "Work-Based Learning Policies, Procedures, and Resources") at 11;App.118; 29 C.F.R. 570.50(c)(1)-(2)(i)-(ii)). The school and employer must provide the student learners with safety instruction, including on-the-job training, and must establish a schedule of "progressive work processes to be performed on the job." 29 C.F.R. 570.50(c)(2)(iii)-(iv). The student-learner exemption may be revoked where WHD determines that reasonable precautions have not been taken to ensure the student-learner's safety. See 29 C.F.R. 570.50(c)(2). Putting aside their accuracy, the district court's findings that Laurelbrook "adequately" supervised its students; provides "adequate and reasonable safeguards to protect students from hazardous activities"; and has performed "reasonably well" in ensuring the safety of its students, 2009 WL 2146230, at *3 (FOF 42,43), do not on their own terms meet the very strict "direct and close supervision" standards enunciated in the Secretary's regulations.[13] Moreover, Laurelbrook's three-paragraph

[13] Laurelbrook's self-study report, prepared as part of the EASEA accreditation process, specifically found that the training program only "partially met" EASEA's requirement that its

"vocational training agreement" does not comport with the legal requirements for a student learner and is not comparable to the lengthy state agreement, which is much more comprehensive than the Laurelbrook form and is intended to ensure that any vocational work is performed in accordance with 29 C.F.R. 570.50(c). See R.68,P.Exh.83 at 39-46;App.121-128; R.61(tr.40).

Finally, the district court found that Laurelbrook is "an approved and accredited school of the State of Tennessee Department of Education." 2009 WL 2146230, at *2. This finding is contrary to the evidence, which establishes that Laurelbrook is accredited by EASEA, which is itself accredited by Tennessee as an accreditation agency. The state does not directly accredit Category 2 schools such as Laurelbrook (R.69(tr.474-75)). And while it is true that the state has approved a handful of EASEA vocational courses (which Laurelbrook courses are supposed to be modeled on) for transfer credit because it has determined that 80 percent of the curriculum in each of those courses is similar to the state's curriculum, 2009 WL 2146230, at *3-4 (FOF 46, 47); R.68,D.Exh.37 ("Crosswalk" of Tennessee and EASEA vocational curriculum, page 1);App.173, this does not establish that Laurelbrook's overall vocational program

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members' programs comply with applicable safety and health regulations (R.68,P.Exh.10 at 122;App.21); see id. at 237 (recommending establishment of safety guidelines and instruction in all areas of the vocational training program);App.24.

is similar to the state's.[14] As discussed supra, many aspects of Laurelbrook's vocational training program related to progressive learning, supervision, and rotation do not meet the state standard.

3. The second Portland Terminal factor examines whether "the training is for the benefit of the trainees or students." FOH ¶10b11(b)(2). Nearly all the cases addressing trainees' employee status have focused on this factor and examine in particular whether the trainees are performing productive work. In Ensley, for example, the Fourth Circuit concluded that because the trainees were performing actual work, their efforts inured to the benefit of the employer. See 877 F.2d at 1209-10; see also Wirtz v. Wardlaw, 339 F.2d 785 (4th Cir. 1964). Likewise, in Herman v. Hogar Praderas de Amor, Inc., 130 F. Supp. 2d 257, 265 n.29 (D.P.R. 2001), the court concluded that because nurses' aides trainees performed "regular work" for the company, their efforts benefitted the employer. In Archie, the court found there was "no doubt" that the participants in the job training program, particularly because they were homeless and needed to be taught the most basic job skills, "benefitted

[14] Significantly, there are a number of EASEA vocational courses, including forestry, gardening, lawn and landscaping, baking, food preservation, and plant services, that the state has specifically found to lack sufficient similarity to the state's vocational classes to warrant automatic credit transfer. 2009 WL 2146230, at *3-4 (FOF 47); R.68,D.Exh.37 ("Crosswalk" of Tennessee and EASEA vocational curriculum, page 2);App.174; R.71(tr.1050-51)).

enormously from the work opportunities." 997 F. Supp. at 533, 535. The court concluded, however, that since the defendant could not have met its contractual obligations without the participants' work, and was able to provide its services at below-market rates, it received a "greater advantage" from the participants' work. Id. at 533-35. In Baptist Hospital, this Court agreed with the district court's assessment that the hospital was the primary beneficiary of the trainees' labor because the trainees performed work "that would otherwise have been done by regular employees and work for which the hospital charged patients at full rates," particularly where the court found that the trainees had been "short-changed educationally" by a program that lacked adequate supervision and included menial and repetitive tasks. 668 F.2d at 236 (internal quotation marks omitted). In Atkins v. General Motors Corp., on the other hand, the Fifth Circuit held that trainees received the primary benefit from the training because they did not do any compensable work. See 701 F.2d at 1128; see also American Airlines, Inc., 686 F.2d 267.

Application of these cases to the record in this case shows that the district court's conclusion that the students' work inured primarily to their benefit is wrong as a matter of law. This case is similar to Baptist Hospital and Archie, where the menial tasks performed, lack of supervision, and the absence of

other factors indicative of a true vocational training program compel the conclusion that the students, although they may have derived some benefit from their training, did not derive the greater benefit, particularly where Laurelbrook received Medicaid reimbursement for its patient care, to which the students indisputably contributed (R.68,D.Exh.9 (Laurelbrook Medicaid Nursing Facility Cost Report) at 12; R.68,P.Exh.82 (Laurelbrook financial statements prepared by private Certified Public Accountant firm) at 18; R.60(tr.337-38);App.;R.73(tr.1251-54,1257-61)).[15] As in Archie, Laurelbrook kept track of the students' hours, which were submitted to the state for licensing and Medicaid reimbursement purposes. It is instructive that the testimony reveals that Wellman acknowledged that it was preferable to get more help from the Laurelbrook staff rather than shifting more and more work to outside people (R.71(tr.913-14)). "Outside people" referred to Wellman nursing, which billed Laurelbrook for the time worked by its employees at the Sanitarium. The district court acknowledged that the students' work "contribute[d] to the maintenance of Defendant." 2009 WL 2146230, at *2 (FOF 17). Therefore, the students' work,

[15] As noted supra, Laurelbrook received further financial benefit from the students' work through the sale of wood pallets and farm produce.

which permitted the Laurelbrook programs to continue with fewer paid staff, inured to the greater benefit of the institution.[16]

The district court found that "[a]ny benefits derived by [Laurelbrook] from the students' work is secondary to its

[16] The district court relied on several cases, arising in very different contexts, concluding that students receive the benefit of work they perform for a school. In Bobilin v. Board of Education, 403 F. Supp. 1095 (D. Haw. 1975), for example, the district court held that public school students who were required to perform cafeteria duty received such significant educational value from this activity as to preclude an employment relationship. At least one court, however, has criticized the Bobilin decision for improperly applying the Portland Terminal factors, specifically, not taking into account the fact that the cafeteria duty was "extensive and surely repetitious"; "ignor[ing] the issue of displacement of regular employees"; and "ha[ving] no foundation other than a determination that students are just students [as opposed to employees]." Baptist Hosp., Inc., 473 F. Supp. at 468 n.3, rev'd on other grounds, 668 F.2d 234 (6th Cir. 1981). In fact, WHD has stated that students can do work at a school they are attending without becoming employees of the school, such as in the lunchroom or library, or in a clerical capacity or as junior patrol officers, provided that the work is occasional and for short periods of time, and provided there are no other indicia of employment. See FOH ¶10b03(f). Similarly, the factual situation in another case relied on by the district court, Marshall v. Regis Educational Corp., 666 F.2d 1324 (10th Cir. 1981), where the court found college residential assistants ("RA"s) to be students, not employees, of the college is specifically reflected in section 10b24(a) of the FOH, which recognizes the educational value of the RA program, while clarifying that college students are employees if their duties are not part of an educational program and if they receive compensation for their labor, as is the case with students who work at food concessions at athletic events. See FOH ¶10b24(b). The district court here also relied on cases such as Blair v. Wills, 420 F.3d 823, 826, 829 (8th Cir. 2005), to suggest that, because Laurelbrook is a boarding school, it is entitled to keep its students busy with "chores," which the Eighth Circuit found to be outside the scope of work. 2009 WL 2146230, at *5. As discussed supra, however, Laurelbrook students were scheduled to work, at a minimum, three hours a day, six days a week, work that cannot possibly be characterized as "chores."

religious mission and therefore any such benefits are much less than those received by the students." 2009 WL 2146230, at *3,*7 (FOF 49). But the entity's religious mission is irrelevant to the tangible benefits the entity receives from the work of the minors. See Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 298 (1985) (rejecting argument that Foundation's businesses differ from "ordinary" commercial businesses "because they are infused with a religious purpose"). The religious nature of the operation certainly does not preclude the application of the child labor laws. Indeed, the Supreme Court and appellate courts have consistently upheld application of the FLSA to church-affiliated commercial businesses and schools in the face of First Amendment challenges. See, e.g., id. at 303-06; Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1398-99 (4th Cir. 1990). In Brock v. Wendell's Woodwork, 867 F.2d 196, 198-99 (4th Cir. 1989), the Fourth Circuit upheld the application of the FLSA's child labor provisions to a church-run vocational program, noting the government's compelling interest in enforcing that law. Although it recognized the sincerity of the church members' religious beliefs, the court concluded that they could not "immunize the employers from enforcement of the federal statutes." Id.; see Shiloh True Light Church of Christ v. Brock, 670 F. Supp. 158, 162 (W.D.N.C. 1987) ("The right to practice religion freely does not include the right to

jeopardize a child's health."); Prince v. Massachusetts, 321 U.S. 158, 168 (1944).[17]

4. The third Portland Terminal factor measures whether "the trainees or students do not displace regular employees, but work under their close observation." FOH ¶10b11(b)(3). The district court found that "[i]f there was no school there would be no Sanitarium and the students would not be working there . . . . Therefore, students do not displace any adult employees or others that might be willing to work in a nursing home." 2009 WL 2146230, at *3 (FOF 52-53). Such a conclusion was specifically considered and rejected by WHD in an opinion letter responding to an inquiry asking whether there was an employment relationship between a rehabilitation services provider and participants in its food service training program. Op. Ltr., 1986 WL 1171074 (Jan. 17, 1986). In response to the rehabilitation program's position that no regular employees were

[17] Similarly, application of the FLSA to Laurelbrook does not run afoul of the Religious Freedom Restoration Act of 1993 ("RFRA"). See 42 U.S.C. 2000bb(a), (b). RFRA requires an analysis of whether application of the statute in question, if it substantially burdens the exercise of religion, is the least restrictive means for the government to achieve the government's compelling interest. See, e.g., Cutter v. Wilkinson, 423 F.3d 579, 582 (6th Cir. 2005). Even assuming that application of the FLSA to Laurelbrook does substantially burden the members' exercise of religion, the FLSA withstands scrutiny under this analysis. In Shenandoah Baptist Church, for example, in holding that the FLSA withstood the Church's free exercise challenge under the First Amendment, the Fourth Circuit observed that "Congress has here created a comprehensive statute, and a less restrictive means of attaining its aims is not available." 899 F.2d at 1398 (citation omitted).

displaced by the trainees because the cafeteria only existed for training purposes, WHD stated that "the fact is that currently the [rehabilitation program] does operate the cafeteria," and its "employees and the participants in the program are engaged in the preparation and sale of a product, food, to the general public in competition with other area eating establishments." Id.

The district court also found that Laurelbrook "is sufficiently staffed so that if the students did not perform the work at the Sanitarium adult staff members could continue to provide the same services." 2009 WL 2146230, at *3 (FOF 38). The relevant inquiry under this factor, however, is whether a students' work actually eliminated the need for additional full-time adult employees. WHD has stated that "the placement of the trainee at a worksite during the learning experience [must] not result in the displacement of any regular employee -- i.e., the presence of the trainee at the worksite cannot result in an employee being laid off, cannot result in the employer not hiring an employee it would otherwise hire, and cannot result in a[n] employee working fewer hours than he or she would otherwise work." Op. Ltr., 1996 WL 1005201 (May 1, 1996). Hess's testimony that he would need to reassign adults to cover the Sanitarium kitchen, laundry, housekeeping, grounds, and school kitchen if the students were removed from the vocational

program, establishes that the students did in fact displace regular employees (R.71(tr.921-28)). The testimony also establishes that Wellman recognized that Laurelbrook students eliminated the need to hire more outside people. (R.71(tr.913)). In many areas, such as housekeeping and dietary, the student staff outnumbered the adult staff and performed the bulk of the work. See, e.g., R.68,P.Exh.10 (Laurelbrook self-study) at 123,230,237 (acknowledging the need to reduce students' vocational training hours);App.22-24. And, one Sanitarium staff person confirmed there is no distinction between the work performed by student CNAs and adult CNAs (R.70(tr.770-71)). As in Baptist Hospital, therefore, students at Laurelbrook "became functioning members" of the institution, including the Sanitarium, "performing all duties required of them in a fashion that displaced regular employees." 668 F.2d at 236 (citation and internal quotation marks omitted).

5. The fourth Portland Terminal factor looks to whether "the employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may actually be impeded." FOH ¶10b11(b)(4). As explained supra, Laurelbrook certainly derived an immediate advantage from the students' substantial and independent work, which permitted Laurelbrook to maintain its day-to-day operations without hiring additional staff. WHD has,

however, stated that it is likely, when a trainee receives direct and ongoing supervision, that any productive work performed by the trainee will be offset by the employer's burden of training and supervising the trainee. See Op. Ltr., 1996 WL 1005201 (May 1, 1996). The evidence in this case, though, establishes that the students did not work under close supervision, most notably when they were performing housekeeping duties at the Sanitarium and working in the boiler room, general maintenance, and woods. Rather, Laurelbrook students worked independently, and were counted on to contribute a substantial amount of work on a daily basis to keep the institution operational. Therefore, their productive work was not offset by the necessity to supervise them.

6. The fifth Portland Terminal factor assesses whether "the trainees or students are not necessarily entitled to a job at the conclusion of the training period." FOH ¶10b11(b)(5). Significantly, Keith Wellman could not distinguish between students and paid employees who were previously Laurelbrook students, and admitted that "sometimes [students] graduate and come to work through my agency" (R.60(tr.384-86)). A number of Laurelbrook staff members previously attended Laurelbrook as students (R.61(tr.10);R.70(tr.637,698)). Other Laurelbrook students have continued to work for the institution upon the completion of their education, either as employees of

Laurelbrook or of Wellman Nursing (R.60(tr.383-87);R.70(tr.637-38,697-700,738).

7. The last Portland Terminal factor measures whether "the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training." FOH ¶10b11(b)(6). As described supra, although the Laurelbrook students did not receive cash wages for their hours worked, they did receive a scholarship that was in direct proportion to their hours worked. See Archie, 997 F. Supp. at 534 (participants' pay depended on hours worked, which the employer kept track of through payroll sheets that calculated their hours worked). The courts have found these types of "payments" to be "wages" for purposes of this last Portland Terminal factor. In Tony & Susan Alamo Foundation, for example, the Court explained that "[u]nder Portland Terminal, a compensation agreement may be 'implied' as well as 'express,' and the fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are . . . wages in another form." 471 U.S. at 301 (internal citation omitted); see Shiloh True Light Church of Christ, 1996 WL 228802, at *1-2 (court found designation of lump sum payments to student workers as "gifts" to be "an attempt to label them students rather than employees"); Opinion Letter, 1986 WL 1171074 (Jan. 17, 1986) (if a stipend paid to a

rehabilitation facility's food service trainees is "linked in any way to production or hours worked, such payments would be considered wages under FLSA"). Therefore, the fact that the students received compensation, taken alone, should defeat any argument that they are trainees.

E. A Permanent Injunction Should Issue as a Matter of Law because of Laurelbrook's Child Labor Violations and its Failure to Show That it Intends to Comply with the FLSA in the Future

1. The issuance of a permanent injunction under the FLSA is committed to the reasonable discretion of the district court, see Funtime, 963 F.2d at 113, which should consider (1) the employer's previous conduct; (2) the employer's current conduct; and (3) the "dependability" of the employer's promise to comply in the future. Petroleum Sales, 30 F.3d at 657. The court's discretion is not "'unbridled.'" Id. at 656 (citing Dunlop v. Davis, 524 F.2d 1278, 1280 (5th Cir. 1975)). Thus, although the court has discretion to refuse issuance of an injunction, "this discretion is limited by consideration of the importance of prospective relief as a means of ensuring compliance with the provisions of the FLSA." Brock v. Shirk, 833 F.2d 1326, 1331 (9th Cir. 1987) (citing Marshall v. Chala Enters. Inc., 645 F.2d 799, 804 (9th Cir. 1981), vacated on other grounds, 488 U.S. 806 (1988). The court should be guided not by its "inclination" but its judgment, which in turn should be guided by "sound legal principles." Chala Enters., 645 F.2d at 802 (citation and

internal quotation marks omitted). Moreover, the court must act with the knowledge that the Secretary seeks to vindicate a public, and not a private, right. Id. The public purpose underlying the issuance of a permanent injunction under the FLSA is to further the congressional objective of putting a halt to substandard labor conditions by preventing future violations of the Act. See Funtime, Inc., 963 F.2d at 113; Brock v. Big Bear Mkt. No. 3, 825 F.2d 1381 1383 (9th Cir. 1987); Dunlop, 524 F.2d at 1280.

The need for an injunction has been found to be particularly compelling when child labor violations are at issue. See Shultz v. Salinas, 416 F.2d 412, 414 (5th Cir. 1969); Gulf King Shrimp Co. v. Wirtz, 407 F.2d 508, 516 (5th Cir. 1969). Moreover, prospective injunctions under the FLSA are remedial; they are not intended as punishment for past violations. See Petroleum Sales, 30 F.3d at 656. Therefore, prospective injunctions do not present a hardship on the employer, but merely require the employer to do "'what the Act requires anyway -- to comply with the law.'" Id. at 656-57 (quoting Funtime, 963 F.2d at 113-14). Indeed, the injunction is an important tool available to the Secretary for compelling compliance, see Brennan v. Correa, 513 F.2d 161, 163 (8th Cir. 1975), and alleviates the Secretary's burden to investigate to determine if there have been recurrences of the violations. See

Petroleum Sales, 30 F.3d at 656 (citing Funtime, 963 F.2d at 113-14).

2. This Court has held that it is an abuse of the trial court's discretion not to grant an injunction in an FLSA case where there has been a "clear violation of the statute and regulations," and there is no assurance that the offending party will voluntarily comply in the future. Wirtz v. Flame Coal Co., 321 F.2d 558, 560 (6th Cir. 1963); see Petroleum Sales, 30 F.3d at 657; Big Bear Mkt., 825 F.2d at 1383. A district court's belief that the employer did not purposefully violate the Act or otherwise acted in good faith has been held to be an insufficient reason for denying injunctive relief. See Marshall v. Van Matre, 634 F.2d 1115, 1118 (8th Cir. 1980). A district court should "ordinarily" grant injunctive relief in cases where FLSA violations have been established, irrespective of the employer's present compliance, unless the district court is "'soundly convinced that there is no reasonable probability of a recurrence of the violations.'" Solis v. FirstCall Staffing Solutions, Inc., No. 08-0174-CV-W-ODS, 2009 WL 3855702, at *8 (W.D. Mo. Nov. 18, 2009) (quoting Van Matre, 634 F.2d at 1118); Petroleum Sales, 30 F.3d at 657 (permanent injunction appropriate where the employer did not "demonstrate a likelihood, much less give assurance, that it would obey the FLSA in the future") (citation omitted). Thus, current

compliance by itself is not sufficient to prevent the imposition of a permanent injunction, particularly where such compliance is achieved as a result of a government investigation. See FirstCall Staffing, 2009 WL 3855702, at *8 (internal quotation marks omitted); Funtime, Inc., 963 F.2d at 114. Further, even a court's belief that an employer "desires" to comply in the future may not be a sufficient reason to deny an injunction. Correa, 513 F.2d at 163.

3. Here, Laurelbrook violated the Act -- the child labor violations in this case were largely uncontested, and there is no evidence refuting the existence of violations (given an employment relationship). Moreover, Hess' testimony that Laurelbrook could not have a "true vocational program" and "abide by the hazardous activities and occupations rules," establishes that Laurelbrook has no intent to comply with the Act in the future (R.71(tr.956-58)). Therefore, this Court should remand this case to the district court with an instruction to issue a permanent injunction against Laurelbrook. See, e.g., Petroleum Sales, 30 F.3d at 657.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and enter a permanent injunction against Laurelbrook.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 28, I certify the following with respect to the foregoing brief of the plaintiff-appellant Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 13,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2003.

February 3, 2010

s/ Maria Van Buren

MARIA VAN BUREN
Senior Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Maria Van Buren
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS
PURSUANT TO LOCAL RULES 30(b) and 30(f)(1)

R. 1: February 12, 2007 Complaint filed by Secretary of Labor against Laurelbrook School and Sanitarium, Inc.

R. 21, 22: April 24, 2007 Joint Motion for Preliminary Injunction and April 30, 2007 Order by Judge Curtis L. Collier granting Motion

R. 84, 85: July 15, 2009 Memorandum and Judgment Order of Judge Curtis L. Collier denying Secretary of Labor's request for injunctive relief

R. 87: September 11, 2009 Notice of Appeal filed by Secretary of Labor

R. 61: Transcript (unredacted) from Day One of Seven-day bench trial, August 19, 2008, pages:
10
15
40
52
54
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58
59
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61
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257
258
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260
261
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265
266
267

R. 60: Transcript (unredacted) from Day Two of Seven-day bench trial, August 20, 2008, pages:
337
338
341
342
350
356
366
369
370
376
377
381
382
383
384
385
386
387
405
412
413

R. 69: Transcript (unredacted) from Day Three of Seven-day bench trial, March 30, 2009, pages:
452
474
475
503
504
505
509
510
511
512
513
514
515
516
517
518
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605
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614
618
619
620
621

R. 70: Transcript (unredacted) from Day Four of Seven-day bench trial, March 31, 2009, pages:
637
638
645
646
662
667
668
669
684
685
693
697
698
699
700
703
706
708
726
738

771
862
864

R. 71: Transcript (unredacted) from Day Five of Seven-day bench trial, April 1, 2009, pages:
884
886
913
914
921
922
923
924
925
926
927
928
956
957
958
1012
1016
1027
1032
1033
1034
1037
1038
1039
1049
1078
1079
1050
1051

R. 72: Transcript (unredacted) from Day Six of Seven-day bench trial, April 2, 2009, pages:
1090
1096
1108
1109
1110

R. 73: Transcript (unredacted) from Day Seven of Seven-day bench trial, April 3, 2009, pages:
1218
1219

1229
1230
1251
1252
1253
1254
1257
1258
1259
1260
1261

R.68: Clerk's Trial Witness/Exhibit List

Plaintiff's Exhibits

2: List of Laurelbrook Board of Trustees
5: Laurelbrook Policy Manual at 4, 30
6: Laurelbrook 2006-2007 Manual at 12-13, 25, 26
7: Laurelbrook 2007 Handbook at 4
8: Boys' Dorm Handbook at 23
9: Laurelbrook 2005 Yearbook at 60
10: Laurelbrook EASEA materials at 76-77, 122-23, 230, 237, 303
11: Laurelbrook Accident Medical Expense insurance forms at 2, 3, 7, 8, 9
12: Laurelbrook school application at 4
13: Student transcript records at 012
21: State Operations Manual for state inspections of Medicaid facilities at 4-6, 8-9
22: Laurelbrook Nursing Home Licensure Checklist at 56
23: Application for Laurelbrook CNA training
25: Mopping Checklist
27: Boys' vocational training schedules at 1, 4, 6, 9-23
28: Laurelbrook vocational training codes
29: Girls' November 2006 vocational training schedules at 3
41: Girls' January 2007 vocational training records
42: Boys' work schedule
44: Monthly transcript record, December 2006
46: Emergency room injury report at 8
47: Laurelbrook vocational training records at 51, 53-56
55: Sanitarium in-service records
58: Sanitarium laundry in-service records
61: Kitchen guidelines at 40, 50
66: Sanitarium in-service records at 2, 4, 7, 35
68: Boiler watch training checklist
69: Boiler training schedule
82: Laurelbrook financial statements prepared by private Certified Public Accountant firm at 6, 7, 18, 19, 49

83: Tennessee Department of Education publication titled "Work-Based Learning Policies, Procedures, and Resources" at 11, 37-46, 67

Defendant's Exhibits

1-1: Standardized Training and Instruction Forms: "Grounds Maintenance"
1-2: Standardized Training and Instruction Forms: ENVI-025
1-3: Standardized Training and Instruction Forms: FOOD-007-1 to 007-11
9: Laurelbrook Medicaid Nursing Facility Cost Report at 12
37: "Crosswalk" of Tennessee and EASEA vocational curriculum
38: Laurelbrook Nursing Home Licensure Checklist
38-I: Tennessee "Culinary Arts III" course outline
38-Q: Tennessee "Health Services Education" course outline