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Jonathan Barker

GCM

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-136875

DATE: March 20, 1978

MATTER OF: Space rental for HEW employee day care centers.

DIGEST: The Secretary of Health, Education and Welfare (HEW) is authorized by section 524 of the Education Amendments of 1976, 20 U.S.C. § 2564, to use appropriated funds to provide "appropriate donated space" for any day care facility he establishes. That is, the space may be provided by the Secretary to the facility without charge. There is no statutory requirement that this space be in HEW controlled space, nor is there any relevant distinction between the payment of "rent" to the General Services Administration under 40 U.S.C. § 490(j) and of rent to a private concern. Therefore, the Secretary may lease space specially for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located.

The General Counsel of Health, Education and Welfare (HEW) requested the opinion of this Office on whether that Department may use appropriated funds to lease space for the purpose of establishing day care centers for the children of HEW employees, in those instances in which there is no suitable space for the establishment of such centers in buildings in which HEW components are located. He notes that section 524 of the Education Amendments of 1976, authorizes the Secretary of HEW to establish, equip, and operate day care center facilities to serve children of HEW employees. It is expected that these centers will generally be established in buildings owned or leased by the Government in which components of HEW are located. However, the Department anticipates that in some instances HEW buildings may not be suitable for the establishment of day care centers and therefore any facilities which might be established would have to be located in specially leased space. The General Counsel asks whether Department appropriations are properly available for such purpose.

In a legal memorandum enclosed with his request, it is argued that based upon the language and legislative history of section 524 of the Education Amendments, the language and legislative history of a "comparable statute," and applicable decisions of the Comptroller General, the Secretary may lease space for a child day care center where suitable space is unavailable in buildings in which HEW facilities are located.

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Section 524 of the Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081, 2240, 20 U.S.C. § 2564, which was approved on October 12, 1976, provides:

"Notwithstanding any other provision of law, the Secretary of Health, Education, and Welfare is authorized by contract or otherwise to establish, equip, and operate day care center facilities for the purpose of serving children who are members of households of employees of the Department of Health, Education, and Welfare. The Secretary is authorized to establish or provide for the establishment of appropriate fees and charges to be chargeable against the Department employees or others who are beneficiaries of services provided by such facilities to pay for the cost of their operation and to accept money, equipment, or other property donated for use in connection with the facilities. No appropriated funds may be used for the equipping or operation of any centers provided under this authority. The prohibition made by the preceding sentence shall not preclude the provision of appropriate donated space nor the purchase of the initial equipment for the centers, except that the cost of such equipment shall be reimbursed over the expected life of such equipment, not to exceed 10 years."

The statute on its face specifically authorizes the Secretary of HEW to establish, equip, and operate day care facilities for the benefit of HEW employees. However, it also makes it clear that the expenses of equipping and operating these facilities be borne solely by Department employees and others who benefit from them and not, in the long run, by the Federal Government. The costs of establishing as opposed to equipping or operating the centers, are not specifically included in the general prohibition against using appropriated funds for the day care center. It is the extent to which appropriated funds may be used for establishment of the center which is at issue.

Section 524 originated as an amendment to Senate bill 2657, which was subsequently enacted by Congress into the Education Amendments of 1976, *supra*. It was proposed by Senator Beall and agreed to by the Senate on August 26, 1976. As originally proposed, its language was virtually identical to the section as eventually passed, except that the two final sentences were added subsequently by the Conference Committee. Senator Beall remarked at the time he introduced the amendment:

"Mr. President, the need for this amendment was called to my attention as the result of the efforts of HEW's employees at Parklawn to have a day care center. In this case, space is available to the employees for a day care facility, but under an existing interpretation, HEW lacks-- or has inadequate authority to address this and similar situations which the Department has confronted.

"I initially became involved in the Parklawn situation when I assisted the Parklawn Day Care Foundation, an employee organization, in securing permission from GSA to establish a day care center for them. However, one of the conditions of GSA's permission was that alterations to be accomplished by GSA would be done on a reimburseable basis. HEW has refused--because they do not have specific enabling statutory authority to do so--to pass renovation money from the Foundation to GSA so that the required renovation could proceed. A similar situation arose at the Department of Housing and Urban Development and the Senate amended the Housing Amendments of 1973 to provide HUD with the needed authority. This is now Public Law 94-375.

"The amendment I am proposing tracks the HUD language with one addition. My amendment would make it clear that HEW could accept donations-- either money, equipment or other property--for use in such child care facilities. I would emphasize this amendment does not require the Department to establish day care centers. It is permissive. And, further, it--like the HUD--passed provision--authorizes the Secretary to provide for or establish appropriate fees and charges for the operation.

"Mr. President, when employees band together in recognition of their need for child care services and the Government cannot accept the money they wish to donate for the purpose of renovating a facility to make this child care center possible, it is no wonder our citizens shake their heads in amazement as they try to fathom governmental action or inaction. This group has been confronted with unbelievable roadblocks in trying to bring into being a child care center.

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The obstacles can be removed by providing--as the amendment does--HEW with the same authority as was given to HUD earlier.

"Mr. President, I want to pay particular tribute to the work of my House colleague, Congressman GUDE, for his efforts to resolve this problem.

"I urge the enactment of this amendment.

"Simply, Mr. President, this is an amendment that would give HEW the needed authority. It will help clarify the situation that has arisen at Parklawn, but elsewhere at HEW." 122 Cong. Rec. S14655 (daily ed. August 26, 1976).

It is evident from Senator Beall's comments that the principal purpose of his amendment was to provide HEW with the specific enabling authority to act as a conduit between one of its employees' organizations and the GSA for the purpose of transferring that organization's renovation money. The amendment was offered, in part, in response to the situation of HEW employees at Parklawn, represented by the Parklawn Day Care Foundation, who sought the establishment of a child day care center in the Parklawn facility.

One of the conditions to GSA's granting permission for the establishment of the facility was that alterations necessary to render the space suitable for a day care facility would be done only on a reimbursable basis. According to Senator Beall, because it had no specific enabling statutory authority to pass renovation money from the Foundation to GSA, HEW declined to do so. The amendment was offered, "to make it clear that HEW could accept donations--either money, equipment or other property." *Id.* It thus appears that renovation of space was not intended to be accomplished at public expense even though the statute does not explicitly include such costs in its general prohibition.

The question of whether public funds, i. e., HEW appropriations, could be used to rent additional space for the day care facilities was not considered at the time section 521 was initially approved by the Senate. As indicated earlier, Senator Beall's amendment was proposed in large part as a result of the situation at HEW's Parklawn location during a time when it was believed that suitable previously leased space in the building was available.

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As noted above, the final sentences of section 524 which allows the Department to provide "appropriate donated space" was added in the conference committee. Conf. Com. Rep. No. 1701, 94th Cong., 2d Sess. (1976). Representative Quie, one of the conferees, in explaining the conference amendment to the House of Representatives during its consideration of the conference committee report stated:

"The Senate bill contained language permitting the Secretary of Health, Education and Welfare to establish day care centers for departmental employees. The conference committee retained that section with an amendment which I offered to make clear that no appropriated funds may be used for operating any of the centers, and to further provide that any equipping of facilities done by the Department would have to be repaid. I have no objection at all to the provision of these centers. My only concern is that these centers not become a fringe benefit over and above those recognized by Civil Service laws. They should be self-supporting in every way possible. The language does permit the Secretary to provide space for those facilities." 122 Cong., Rec. H11699 (daily ed. September 29, 1976). Emphasis added.

The phrase, "appropriate donated space" is stated as a special exception to the immediately preceding statutory prohibition against using appropriated funds for other day care center needs. Clearly the Secretary is permitted, in his discretion, to provide the day care facility with suitable space without charge. That is, the Secretary may "donate" the space to the facility.

We can find nothing in the statute or its legislative history which requires that HEW appropriations be limited to the provision of space only within buildings in which HEW components are located. It is true that the situation of employees at HEW's Parklawn location where suitable space was thought to be available prompted the legislation. However, the authority of section 524 extends to the establishment of day care centers for any component of HEW which may or may not have suitable space available in already owned or rented space.

From a financial point of view there is not much difference between the cost to HEW of space donated in an already occupied building and space leased specially for the day care center. Space provided in GSA-controlled buildings occupied by HEW will result in the Department's being charged the standard level user charge (SLUC)--as it is with all space assigned to it--which generally

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approximates commercial charges for comparable space. 40 U.S.C. § 490(j) (1978). There is little distinction, insofar as HEW's appropriations are concerned, between the payment of SLUC and the payment of the rental charge which would be incurred by HEW were it to provide facilities in specially leased space in other buildings. Therefore, we find no basis upon which to distinguish between the provision of space within a building occupied by HEW and of space in another building.

In light of the foregoing, we conclude that Department of HEW appropriations are available for the leasing of space specifically for the purpose of establishing day care centers for the children of HEW employees in those instances in which there is no suitable space available for the establishment of such centers in buildings in which HEW components are located.

Acting

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Comptroller General
of the United States