AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **April 2017**
From: **A. Eric Johnston**
Re: **HB277/SB 236 - Proposal to Regulate Church Daycare Ministries**

The Legislature is poised to remove 35 years of protection from church daycare ministries in Alabama. HB277 and SB236 amend various sections of the Alabama Code, but in particular § 38-7-3, 1975 Alabama Code by removing the exemption of church and religious run daycares from Department of Human Relations ("DHR") regulation. Advocates of the legislation claim child safety is at risk.

It is true there have been several unfortunate events resulting in harm to children. Yet, these are no greater than what has happened at non-exempt secular daycares. What is despicable is the "franchising" of "church daycares" by those whose motive is profit, rather than providing for young children in a safe environment. These persons are taking advantage of the freedom that churches enjoy from regulation and using it as a cover to provide often less than desirable environments for young children.

People set up churches under Alabama law by merely incorporating as a church. Once they are incorporated shamelessly claiming they are a church, they set up a profitable daycare operation and are tax exempt and, more importantly, exempt from state regulation. Rather than attack this problem, HB277/SB236 attack legitimate church daycare operations. Why are legitimate church operations exempt? That is a good question and a good answer.

In the 1960s prayer and Bible reading were removed from public schools. As a result, churches sought ways to provide safe, religious educational and childcare environments for their children. They set up Christian schools and daycares which operated as ministries of the church. Religion is taught there. These are religious and evangelical outreaches to the community governed by the doctrine of a particular church or its denomination.

State officials across the country did not like this development. In many states beginning in the late 1970s, attempts were made to regulate these church ministries. The most egregious was when Nebraska education authorities arrested Pastor Everett Sileven for refusing to permit state officials to enter his church and padlocked his church. In 1982 in Alabama, four letters were sent out by the State Department of Education to pastors in different parts of the state threatening similar action. This was a catalyst for churches to protect their religious freedom. Threats of legal action resulted in cooperation with state authorities to provide exemptions for church ministries of school and daycare. Tolerance of religious freedom by government has always been tenuous. That is why religious freedom is our first freedom, the First Amendment to the U.S. Constitution. The founding fathers recognized it must be protected.

In 2013, the Alabama State Department of Education, under new Superintendent Tommy Bice, instructed church schools to meet with him for the purpose of new regulations, in spite of existing law, § 16-28-1, et seq., which exempted church schools. The church responded, as it did in 1982, and through legislation enacted § 16-1-11.1 and other statutes which renewed and further protected church schools.

The daycare law is no different. Church daycares are always subject to state interference. But, we must be clear, they, like secular daycares, are first interested in the welfare of their children. Protecting children and religious freedom is not mutually exclusive. Those who are advocating HB277/SB236 are not wrong in their desire to protect children. They are wrong in disregarding the protection of religious freedom.

We recently provided testimony to a House Committee that HB277 would violate the Alabama Religious Freedom Amendment, which provides for what is called the "compelling interest test." The essence of this judicial test is that before government may burden or restrict a religious activity or belief in anyway, it must first have a compelling interest to do so and then achieve that compelling interest in the least burdensome or restrictive way. As written, HB277/SB236 do not meet this test and are unconstitutional. This problem is remedied by a less intrusive change to the statute. The statute can be amended to define church and religious schools, excluding by definition those who have subverted the law for their profit motives. Other provisions like insurance requirements, low child/staff ratios, and DHR verifying actual existence of legal and proper operations are far less burdensome to church religious rights and would be a constitutional remedy to the problem.

The committee gave HB277 a favorable report, conditioned on the understanding that supporters of the bill would work with us to achieve a constitutional and acceptable solution to the problem. They have refused to cooperate, preying on the goodwill of legislators by telling horror stories of poor childcare. In reality, none of their problems would have been prevented by DHR regulation. All are health department issues already subject to law. Their effort is a well financed goal to expand all childcare to state regulation. We will insist on a proper solution. Unbridled regulation is not acceptable. Both sides must realize what is at stake and balance the needs as required by law. We urge concerned persons to enter the debate by insisting on adherence to constitutional principle, religious freedom and the health and safety of those who are unable to protect themselves.