

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

To: Interested Persons
Date: March 2018
From: A. Eric Johnston
Re: HB76 – Daycare Bill

There is pending in the Alabama Legislature a daycare bill related to church daycare center licensure. The bill was a compromise of one from last year, but which is now acceptable to advocates for church daycares. However, there were complaints from others for separation of church and state reasons. Those who have normally agreed on religious freedom issues find themselves at odds with a few of their allies. This confuses not only legislators but citizens. People do not know what to believe because of the apparent disagreement.

The disagreement is not over protecting religious freedom. The ideas articulated by opponents in committee and in the media are well stated. The problem is while it is possible to articulate principles and platitudes about religious freedom, it is more difficult to apply them in the real world.

To be clear, the purpose of HB76 is to differentiate between proper church daycare ministries and those church daycare operations which either masquerade as such, or who operate using federal or state funds, both for profit. The main catalyst for this problem is a federal funding act passed in 2014 requiring licensure of all daycares which take federal funds. Many church daycare operations in Alabama had begun accepting those funds. Over \$92 million in federal funds were funneled through the state for childcare in 2016. This created the ministry versus for-profit dichotomy which has now created the confusion. Daycare has become necessary and ubiquitous due to both parents working, a profit opportunity for some.

HB76 is protection for proper church daycare ministries from regulation which is being required by the federal government of the Alabama Department of Human Resources (“DHR”). While DHR is often seen as the enemy, it is a public agency created to protect the public good. There must be a line at which it may not transgress when it comes to religious freedom. HB76 maintains the 1981 church daycare licensure exemption. DHR must distinguish between legitimate church ministry and other operations. HB76 clarifies the law to provide that churches operating legitimate ministries will send in a minimum of paperwork, most of which is already required, to validate their operations. If a church cannot provide that information, it would be subject to inspection. The only other time the bill permits an inspection by DHR is if there is reasonable cause to believe that a child is in danger. Last year, child advocates wanted annual inspections by DHR, but gave up that requirement this year.

Child advocates are strident in their support for the bill. They speak only about protecting children. Most of their examples occur in licensed agencies. Merely being licensed does not stop human error. However, we cannot become disoriented in our effort, but must work through the process to address changes in the real world that have occurred over the last 37 years, while at the same time protecting the integrity of church ministry. That is what advocates for legitimate church ministry have done in coming up with this compromise bill. As long as a church operates on the basis of its own principles and with its own funds, there is no improper interference by DHR. Licensure and regulation only occur if the church is in taking the federal or state funds for its support. Through decades of religious liberty litigation, we have never been able to adequately argue that regulation does not come with government funding.

Annual inspections are required by fire and health departments, which is already the fact. There is a requirement for a church to carry property, casualty and liability insurance, which is for its own protection. These type requirements are not burdensome and improper, but realistic. Criminal background checks are already required by current law.

There was a suggestion that HB76 is a foot in the door for future church regulation. This bill adds a provision not in existing law that clearly says that even the religious teaching or practices of a licensed faith-based childcare facility are not infringed. Clearly, remaining exempt, as the bill states, maintains the proper separation of church and state.

We regret the confusion created by our friends who feel compelled to express their opinions. They have a right to do so. We hope they will study the issue more closely and confer with those who have spent hundreds of hours coming to this conclusion. If they will do so, we believe they will understand how to apply the principles they so clearly articulate.