

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

**To:** Interested Persons  
**Date:** April 2018  
**From:** A. Eric Johnston  
**Re:** Changes to the Alabama Daycare Law

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We have just completed a long and difficult odyssey resulting in modification of Alabama's existing church daycare law. It involves several statutes.<sup>1</sup> We have reported on this in past Educational Updates.<sup>2</sup> We will summarize what happened and focus on changes to the law which will go into effect by August 1, 2019.

The odyssey began when we were blindsided last year by childcare advocates, VOICES for Alabama's Children, who were seeking to totally remove from license exemption church operated daycares. In 1981, laws were passed that exempted church operated daycare ministries from state regulation. Those operated fine for 36 years, but changes in the culture and in daycare operations prompted the efforts to remove licensure exemption. Those advocates were uncooperative in 2017 and the bill died. However, in the second year, we came together with Representative Pebblin Warren (bill sponsor), with support of the leadership and other members of the Alabama Legislature. The role of the Alabama Department of Human Resources ("DHR") was uncertain in both years. While it was not out front, it definitely had an interest. VOICES "voices" were muted in the second year. Notwithstanding the roles everyone played, we were able to agree on compromise legislation that will not only benefit church daycare ministries, but rectify extant problems.

When church daycare ministries were first exempted in 1981, they were relatively small and few in number. However, as the culture changed and both parents began working outside the home, daycare grew into a profitable industry. Then, the federal government passed the Federal Child Care Development Block Grant Act of 2014 annually funding daycares that resulted in, for example, the State of Alabama receiving in 2016 for childcare over \$92 million. This was an incentive for many daycares, including those operated by churches, to take the federal money. The grant, however, had conditions, including licensure. At no time did we oppose the axiom that if you take federal or state money you must comply with applicable regulations. Religious freedom has always been based on the idea that you answer either to God or mammon. Our goal was to maintain religious freedom for legitimate church daycare ministries, while protecting child safety.

The 1981 exemption of church daycare ministries already required a number of things of churches. These included that parents sign an affidavit recognizing the church is not regulated or licensed by the state. The church files an annual certification that it is operating as a church operated daycare and in compliance with the exemption law. It provides certain information to parents like child staff ratio, discipline policies, type of curriculum used and religious teachings. Later, laws required background checks to be done for employees of church daycares. There has been a misconception by many who opposed these changes, as well as by the media, that background checks were not previously required. They were. Following are the changes to the law:

- ▶ The definition for daycares now includes "preschools." That does not create another class of daycares to be regulated. It is another name for a pre-K or K program.
- ▶ The word "elementary" was removed as an adjective modifying a religious nonprofit school. That limited exemption for some religious nonprofit schools that would not be classified as "elementary." This expanded the definition of who could be an exempt daycare.
- ▶ If a church receives federal or state funds, it is not exempt from licensure. This federal money flows through the state. It is often hard to distinguish between which is which. However, the deciding factor is whether the school accepts those funds. Many believe that funds indirectly received by a church for a foster daycare child, for example, would make the ministry subject to licensure. This is doubtful, but if DHR did insist, the simple way to avoid that would be to scholarship the foster care child.
- ▶ Fire and health inspections are already required throughout the state and done by local authorities. The law is clarified that these will be done annually, and copies of the inspection reports will be given to DHR. If a church gets an update to a fire, health or criminal background report, it reports it to DHR within 30 days. This is good policy and is something that should be followed in any event.
- ▶ Property, casualty and liability insurance is now required of churches which operate daycares. This is new but is desirable to protect not only the church from lawsuits, but to provide remedies to persons who are injured.
- ▶ A statement must be posted at the church daycare that the daycare is not regulated or licensed by the state. This is wise to do in order to minimize liability or misunderstanding with parents.

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<sup>1</sup> Sections 13A-6-29, 38-7-2, 38-7-3, 38-13-2, 38-13-3, 38-721, 1975 *Code of Alabama*.

<sup>2</sup> April 2017, June 2017, March 2018.

- ▶ If a church plans to open a new exempt daycare ministry and has not had one in the past, it must give DHR 30 days' notice in advance. DHR will visit and determine if it is in compliance with the exemption. Compliance is merely that it is a church and has set up a program in compliance with the law, most of which is being itemized in these bullet points.
- ▶ DHR may inspect a church daycare at anytime if it believes the church is not operating as a exempt ministry or if it has notice that the safety of a child is at risk. These powers already existed.
- ▶ Some churches may wish to accept licensure, particularly if they want the federal funds. The "Minimum Standards" (DHR regulations) have physical structural requirements for the operation of a daycare. Some churches may not meet those requirements, such as the size of rooms, number of toilets, *etcetera*. Those churches would be grandfathered into licensure without making those expensive changes.

Churches which operate daycare ministries will not notice much change in what they have done in the past. There will be burdens on local fire and health departments to do their jobs. We believe the changes will not work problems for churches and their daycare ministries will continue to operate as in the past.

As noted, our culture is very different today than it was 37 years ago. We expect to see changes in the future. We do not expect to see the status quo for religious freedom. Religious freedom is under threat today more than ever in the past. There is a change in the culture due in part to changing attitudes of the millennial generation, the influences of Bernie Sanders socialists, and the diminution of church influence.<sup>3</sup> With that in mind, we must be prepared to respond as appropriate to threats to religious freedom.

Childcare advocates threatened religious freedom in this effort. By this legislation, we have updated the statutes and responded to the threat. We do not anticipate the Alabama Legislature would entertain more restrictions on churches in the foreseeable future. These changes meet the strict requirements of the Alabama Religious Freedom Amendment ("ARFA").<sup>4</sup> There was no proof of a compelling interest to change the law, but even so, these changes are the least restrictive on church ministry. Licensure would violate ARFA. In the second year of our effort, childcare advocates were not openly involved. We think their participation was misguided and uninformed. They are still suffering from that condition. It was reported on al.com, in March, the following:

"Angela Thomas, Communications Manager for VOICES for Alabama's Children issued a statement calling the bill an 'incremental step.' VOICES has advocated for years for a repeal of the license-exemption for church-affiliated centers.

"Our position on the state of childcare licensing remains the same – all childcare facilities must be licensed and inspected," Thomas said."

VOICES spoke frequently of injuries and abuse of children in church daycares. However, most of their examples were from human error and which licensure would not have corrected. Examples occur in both licensed and exempt daycares. VOICES used the death of a boy in Mobile last year as pretext to renew their licensure efforts. He died at a daycare masquerading as a church daycare ministry. It had multiple locations, took federal funds, did not do a background check, and apparently had not been inspected by DHR. The new laws will help correct those types of problems.

VOICES, DHR and other critics must understand the interplay of regulatory and constitutional law. If they had initially, the efforts to update these statutes would have been by mutual agreement with a minimum of conflict and time. Child safety is and has always been the primary goal of Alabama laws related to all daycare operations. That does not mean that the religious freedom of churches is compromised by inappropriate interference by the state. These adjustments to the law protect the church more now, than what the existing 1981 law did.

Because of the factors mentioned above, it is likely adjustments will need to be made to daycare regulation. Many churches have already stopped taking the federal funds and will not be licensed. Some churches will decide to take or continue taking the federal funds and be licensed. These may require attention. Of particular concern to us, but not to the childcare advocates, is the more immediate effect these changes may have on some African-American churches which operate daycare ministries but rely on federal funds. We tried to address this, but the advocates declined. The type or magnitude of these problems cannot be predicted but will probably need attention.

It is certain to say, regardless of who the players may be, if the childcare advocates attempt to return with legislative, legal or political efforts to interfere with church ministries, they will be opposed at every turn. While they sincerely believe in their mission to protect children, they fail to recognize constitutional limitations on their actions. The Southeast Law Institute will continue to work with organizations, churches, and individuals to protect religious freedom. Over the last two years, we were blessed to work with the Alabama Christian Education Association led by its Executive Director Robin Mears<sup>5</sup> and ALCAP, led by its Executive Director Dr. Joe Godfrey. There were other individuals and representatives of churches who probably prefer to go unnamed. Our efforts were on behalf and to the benefit of every church in every denomination in the State of Alabama which has a daycare ministry.

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<sup>3</sup> Educational Update December 2017.

<sup>4</sup> Article I, § 3.01, 1901 Constitution of Alabama.

<sup>5</sup> Mr. Mears will be preparing practical form and other information for churches to implement changes.

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