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## MEMORANDUM

**TO:** Interested Persons

**FROM:** A. Eric Johnston

**DATE:** April 26, 2017

**RE:** **The Child Safety Act**                      **The Alabama Youth Residential Prevention Act**  
**HB277/SB236**                                      **HB440**

This is a status report on the above legislation. We have made significant progress on softening the bill's intended consequences, while preserving religious freedom. There have been many opinions and ideas circulating, but it is important that we understand the context and procedures that affect this legislation.

Southeast Law Institute became involved in this effort because the primary purpose of the legislation was to burden religious freedom. Earlier memoranda have explained the genesis and the history of the existing law which has been in effect for 35 years. This recent legislation is the first time there has been a serious effort to make a change to that law.

Our goal throughout this process is to assure the protection of religious freedom. We must keep in mind that legislation becomes law and then becomes applied in the real world, often in courtrooms. Therefore, our goals are to work within the strictures of the legislative process, but to uphold the legal parameters within which laws must operate. In this situation, for religious freedom, the most stringent judicial test, strict scrutiny, is applicable, which requires the state to have a compelling interest before it can regulate and then to do so in the least burdensome way.

The initial version of the legislation totally and absolutely removed the exemption for church run daycares. It placed these ministries of the church under the control of the Department of Human Relations ("DHR"). This was totally unacceptable. Passage in that form would have been unconstitutional. We advised proponents of the bill to that effect, but they did not seem to be listening.

We recognized that there have been circumstances that had developed in recent years that require revisiting the existing law. We have heard for several years there would be an effort to remove church daycare exemption. Finally, this year legislation was filed to do just that. There have been

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abuses of the law leading to this bill. These consist primarily of those who masquerade as churches which operate for profit daycares without any oversight, such as you would have through a church body and its members. Secondly, there have been those who have operated so called church daycares for profit but without sufficient regard for the wellbeing of the small children who are there. Again, there would be no real oversight.

A well funded effort, approximately \$2 million which we could identify, has gone into the effort of removing church ministry protection. It is difficult to know exactly who the main proponents of this effort are, but we do know who most of the players are. Some of them stand to profit in one way or another if the legislation passed in the form they wanted. There is the prospect of new federal funds that would come into the state for daycare regulatory purposes.

We had several meetings with the proponents of the bill. Until the later stages, they were not interested in compromise. They insisted until the very end that DHR license church daycares. It was only in the waning hours of the House session on that particular day that they finally agreed to remove that requirement. That was a major success for us, regardless of what the proponents of the bill said to the media.

HR277 is the current vehicle for the legislation. SB236 will not be used. The House bill will be taken to the Senate. It is presently being assigned to a committee and likely to be in committee next Wednesday. There are a few amendments we want to add that will clean up some language, though no substantive changes. From the Senate committee the bill will go to the Senate and then must go back to the House for concurrence with the Senate added amendments. If it passes the House without further amendment, it will then go to the Governor.

As amended, HB277 does not require much more than under current law. The things that will be different are (1) annual inspection by DHR of all daycares to assure they are church run and children's physical safety is protected, but DHR's "Minimum Standards" (significant regulation) do not apply; (2) annual inspections by all local fire and health departments of church daycares; (3) reporting of some additional information to DHR. Any daycare that accepts federal or state funds will not be exempt.

These requirements are the least burdensome method of addressing the problems that exist for which this bill would address. If the bill was ever contested in court, we believe that the welfare of children would be a compelling interest as determined by the court. Assuming that, we try to find the least burdensome way of accomplishing what needs to be done to protect them. What is in HB277 will do that.

Of course, there may be further amendments or problems which will break down the process. We very much want to finish this legislative session with an acceptable law. If we do not, we will be back next year doing the same thing. During that time, we would expect the proponents of church regulation to accumulate more support for their position and make the process much more difficult. We must understand that the legislative process is not perfect. It is a system of compromise, within legal constraints. There are certain lines that we do not cross when we deal with religious freedom. We believe that HB277 will fit within these requirements and in the end we will have a law that will not only protect children, but will be acceptable to most churches. No doubt there will be some who will always disagree. We also recognize that idealistically we always want more. That is not always possible and we strive for that which is possible.

## **The Alabama Child Residential Abuse Protection Act**

The above referenced Act was filed as HB440. This bill is unrelated to The Child Safety Act (HB277), but many felt it also would deal a blow to religious freedom.

We initially reviewed the Act and requested the sponsor, Representative Steve McMillan, to include a very strong provision protecting the religious integrity of any ministry that would operate a residential youth facility. He readily agreed to the amendment without change.

There were several other amendments necessary in the bill. There existed other language dealing with reparative therapy (therapy to deal with homosexual issues), cultural sensitivity training, and other objectionable and potentially problematical requirements. Again, Representative McMillan readily agreed to remove these and it was not his intention they be included.

There was some criticism that HB440 would diminish religious freedom the same as HB277. However, that is not correct. The most important distinction is that HB440 would regulate only residential care facilities where minors are housed for long periods of time and subject to whatever training or methods the operators of the facility practice. We found only two operations of this nature, one in Mobile County and one in Baldwin County. The one in Mobile County was an off-the-record unknown facility which had engaged in significant child abuse, charging very high rates. According to Representative McMillan, it would have made \$1 million this year if it had continued in operation. The Baldwin County facility is, however, a DHR licensed facility, though run by a church and operates without any problem. There are virtually no church operated facilities.

There are no parents or church body readily available to monitor or oversee the operation of the residential facility. This is unlike church daycares which number in the hundreds in Alabama and are responsible to real church operation and oversight on a daily basis. Also, any of these residential facilities could, in the name of being a church, operate in remote locations without any oversight at all. They may or may not be legitimate, but there is no ability to make that judgment and since the bill deals only with minor children, there is a significant possibility of abuse.

We do not see this as an encroachment on religious freedom. It does not affect the religious run substance abuse centers in Alabama, which have an exemption under separate law related to the Department of Mental Health.

In later reviewing the entire bill, we determined there were some inconsistencies and possible loopholes which would have permitted certain secular nonprofits or for profit organizations to operate without DHR oversight. We rewrote the bill for the sponsor and it will be reintroduced with a separate bill number. It is doubtful it will have an opportunity to pass this session since it is rapidly drawing to a close. However, we believe an appropriately drafted law is necessary and quite different than the goal of The Child Safety Act under HB277.

If you have any questions about any of the bills, please let me know. We hope this information is helpful to you at this time and gives you the right perspective on where we have been and where we are headed. The legislative session will probably end sometime in mid-May. We will give a final report and a more detailed analysis of the law, should it pass.

AEJ/pmm