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MEMORANDUM

TO: Interested Persons

FROM: A. Eric Johnston

DATE: February 2, 2018

RE: **HB76 – Daycare Bill**

On February 1, 2018, the House passed the compromise daycare bill, with one amendment. It was an hours long debate, which resulted in an expected outcome.

While the welfare of children was mentioned frequently, particularly related to the small boy who died in Mobile, that masked the real objective of the proponents of the bill. That small boy might not have died if the so-called "church daycare" had done a background check on the culpable employee and DHR had done a follow up, due to her criminal record. That so-called church daycare was a recipient of federal funds.

The initial goal of proponents was to license all church daycares. That idea has been defeated and we hope it will not return. The compromise bill is still a necessary bill that needs to be passed in order to clarify the respective positions of real church daycare ministries and those that masquerade as church daycares, but for profit. The catalyst for this has been the 2014 federal childcare grant act that made daycare a profitable industry.

The amendment that was added to the bill will likely not change interpretation. The original wording was as follows:

> "(2) A childcare facility that receives state or federal funds, is operating for profit, or has at least one child who receives a childcare subsidy from the Department is not exempt for licensure under this subsection."

The amended language reads as follows:

> "(2) A childcare facility that receives state or federal funds or is operating for profit is not exempt from licensure under this subsection."

What is federal or state support will ultimately be determined by other laws and federal and DHR policy. Whether the incidental receipt of state funds from the state, through a neutral secular aid program, violates the child's or foster parent's religious rights by placing the child in a church daycare remains a question. The recent SCOTUS decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer* ruled such a law may violate a person's free exercise rights. Merely putting a child in an exempt program with the incidental use of funds meant for the welfare of the child and not to advance religion, should not be prohibited. It would not matter that the source of the funds is federal or state.

The unfortunate fact remains and with which we must abide is that if you take federal or state funds, you will be regulated to an extent by the provider of those funds. Incidental funds such as a foster parent child voucher should not trigger loss of exemption, while direct federal or state funding might. Alabama has a "severability" statute that applies to all statutes. If any part is unconstitutional, it may be severed from the statute, so long as it does not substantively affect the remainder of the statute. This section could easily be interpreted to meet constitutional requirements, or be severed if necessary, and the rest of the statute would remain in place.

We are grateful to Representative Allen Farley for his shepherding this amendment. The amendment seems to satisfy both sides. If it stands, we hope DHR takes a constitutional approach to this question and does not seek to invoke licensure for incidental events.

The bill now moves to the Senate. It is important that the bill maintain its composure, without more amendments. It will resolve the existing and undesirable conflict between church and state. We hope those who have spoken against the bill will reduce their clamor so that we can finish this bill with a law that will meet the needs of the state and provide protection to the church. We are grateful for the Representatives of the House who worked diligently to find a way to a legitimate compromise and vote the bill out.

AEJ/pmm