

RELIGIOUS EXEMPTIONS FOR RELIGIOUS DAYCARES: A LONG-STANDING DISPARITY IN CARE

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I. INTRODUCTION

Why are states still allowing children to die at daycares exempt from licensing requirements due to religious affiliation? Most recently, in August of 2017, a 5-year-old child died at the hands of a person who likely would have been barred from working in a state-licensed facility. This article will address the recent failure of Alabama to enact an adequate statute that could prevent this situation, despite the child's death. It will also review how other states have been able to accommodate religious child care facilities in the recent past.

Alabama has seen a rise in unlicensed daycares under religious exemptions, and it seems to be a national trend evidencing a larger problem with religious accommodations. This article will focus on why bills are not succeeding in pulling religious daycares under the authority of state oversight, and how further federal action is required to address this issue.

II. BACKGROUND

This past August 5-year-old Kamden Johnson died from heat exposure after being left in his daycare van in 92 degree heat.¹ His body was found on the side of the road, where it had been dumped by the woman responsible for his transportation, Valarie Rena Patterson.² Patterson had a lengthy arrest record dating back to 1991 in multiple states, including a charge of negligent driving with children in the vehicle.³ Unfortunately, the hiring of unfit employees like Patterson does not represent an

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¹ Anna Claire Vollers, *After death of 5-year-old, a look at the Alabama laws that left his day care unlicensed*, AL.COM (August 24, 2017), http://www.al.com/news/index.ssf/2017/08/after_day_care_van_death_of_5-.html.

² *Id.*

³ *Id.*

isolated incident, but rather a systemic defect which continues to plague Alabama.⁴

Children like Kamden are at risk because states like Alabama have chosen to exempt religious daycares from some of the more stringent safety and licensure requirements that secular daycares must follow.^{5, 6, 7} In choosing to send their children to a religious-affiliated daycare, parents (sometimes unknowingly) subject their children to a lower standard of care.⁸

In most American families, all the adults of the family work, meaning that most children under 5 years old in the United States receive some form of care from someone other than a

⁴ *Id.* Numerous incidents of harm to children have been documented, included ones specifically dealing with transportation safety such as in Kamden's case. *Id.*

⁵ For the purpose of this paper, "religious daycare" will be the term used to refer to religiously affiliated or faith-based childcare and preschool options.

⁶ The Alabama Code specifically provides that the standard licensure requirements

"shall not apply to preschool programs which are an integral part of a local church ministry or a religious nonprofit elementary school,...whether operated separately or as a part of a religious nonprofit elementary school unit, secondary school unit or institution of higher learning under the governing board or authority of said local church or its convention, association, or regional body to which it may be subject..."

ALA. CODE § 38-7-3 (1975), prior to enactment of HB 277.

⁷ Not all religious child care options are created equal—there are at least three flavors of such care. First, faith affiliated child care programs represent those which are controlled directly or indirectly by faith-based organizations. Second, faith housed child care programs constitute those which are located within a faith-based organization's building, and which may or may not be affiliated with that organization. Unaffiliated child care programs are generally not included in research of faith-based child care programs. Finally, faith-infused child care programs represent those which include religious instruction or organized prayer or worship and which may or may not be affiliated with a larger faith-based organization. Monica H. Rohacek, et al., *Child Care Centers, Child Care Vouchers, and Faith-Based Organizations*, URBAN INSTITUTE (May 4, 2008), <https://www.urban.org/research/publication/child-care-centers-child-care-vouchers-and-faith-based-organizations>.

⁸ Until the enactment of the Child Care Safety Act on March 27, 2018, it may not have been immediately apparent to parents enrolling their children in religious daycares in Alabama that these daycares were exempt from licensure requirements; however, this new act does require that such daycares "post in plain view in a public area a statement that the program is not regulated or licensed by the Department of Human Resources," in addition to having parents must sign an affidavit acknowledging the same. ALA. CODE § 38-7-3 (1975), as amended by H.B. 277.

parent.⁹ In fact, 23.4 percent of American children under age 5 receive some form of organized child care.¹⁰ Research suggests that children who participate in any type of center-based care rather than home-based care prior to kindergarten have better outcomes on reading, mathematics, and cognitive flexibility when controlling for child's sex, age at kindergarten entry, race/ethnicity, family type, primary home language, and socioeconomic status.¹¹

Evidently, center-based childcare provides children with some educational advantages over their peers.¹² Yet despite widespread need for child care in the United States, and measurable benefits and risks, there is relatively little federal regulation in the area.¹³ State governments maintain responsibility for implementing and enforcing licensure requirements, rules, and regulations for child care centers, while the federal government only extends its involvement so far as to regulate receipt of financial subsidies.¹⁴

Religious day care centers are an extremely common option for parents.¹⁵ A survey conducted by the National Council of Churches evaluated over 14,000 church-housed day care programs and concluded that church-housed daycare programs probably represent the largest group of daycare providers in the United

⁹ U.S. Bureau of the Census, Table 1b. Child Care Arrangements Preschoolers Living with Mother, by Employment Status of Mother and Selected Characteristics: Spring 2010 (Department of Commerce, 2011).

¹⁰ *Id.*

¹¹ Amy Rathbun, Anlan Zhang & Thomas Snyder, *Primary Early Care and Education Arrangements and Achievement at Kindergarten Entry, National Center for Education Statistics* (June 2016), <https://nces.ed.gov/pubs2016/2016070.pdf>.

¹² *Id.*

¹³ Angela C. Oldham contends that the current state of child care regulation, or lack thereof, comes from an over 60-year history of cobbled together initiatives which generally lack any sort of concerted effort at addressing the problem of child care regulations. She discusses that early regulations arose from tension between the need for lower socioeconomic status mothers to work outside the home and the desire to perpetuate traditional gender norms. These early initiatives provided subsidies to allow poor women and widows so that they could remain at home with their children rather than subsidies for child care which would allow the women to work. The regulation of child care today still does not provide sufficient access to safe, effective care. Angela C. Oldham, *Fix Me Baby One More Time: A Permanent Solution for Day Care*s, 65 DEPAUL L. REV. 1139, 1149 (2016).

¹⁴ *Id.*

¹⁵ Greg J. Mattis, *Dilemma in Day Care: The Virtues of Administrative Accommodation*, 57 U. CHI. L. REV. 573, 575 (1990).

States, but that they are also incredibly diverse in both form and purpose.¹⁶ Parents may also choose for their child to attend a religiously affiliated daycare for a variety of reasons such as location, cost, overall philosophy, safety, and flexibility.¹⁷

Additionally, the number of religious-affiliated day cares is growing.¹⁸ Such centers are becoming “more prevalent, more organized, and more evangelical.”¹⁹ Variations exist by region and denomination, but from 1992 to 2008, Protestant programs increased by 76.4%, Catholic programs by 52.6%, and Jewish programs by 47.7%.²⁰ The crucial factor cited by religious-affiliated day care centers as to whether they choose to participate in child care subsidies is to what extent such subsidies would compromise their spiritual mission.²¹

Early child care centers represent an increasingly important resource for parents, and their quality and accessibility have lasting, much broader policy implications.²² For example, access to daycare helps combat gender inequality,²³ improve socioeconomic status of families generally, decrease reliance on other types of public assistance such as TANF and food stamps.²⁴ The education initiated in daycares also affects long-term

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Roger Neugebauer, *Trends in Religious-Affiliated Child Care* (2008), <https://ccie-catalog.s3.amazonaws.com/library/5018412.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Oldham, *supra* note 14.

²³ Heather S. Dixon suggests that daycare is so essential to achieving gender equality that exclusive public funding should be apportioned to the cause of nationalized daycare, and that recent federal legislation and Supreme Court case law suggest that such legislation at this time would likely be successful. Women are disproportionately affected by the current state of available child care options, and often are forced to take part-time rather than full-time work. Even women who do not have children are subjected to a “motherhood penalty” due to stereotypes that women are unproductive, unreliable workers. Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUMAN RIGHTS L. REV. 561, 567-574 (date).

²⁴ While pay equity between men and childless women has improved, the disparity is felt much more acutely for women with children, which is referred to as the “motherhood penalty.” Additionally, women who already earn less money than their male partners are more likely to take time off to care for a baby, further widening the pay disparity. This reality compounded with the cost of childcare in relation to income, means that often it does not make financial sense for women to continue to work outside the home once childcare expenses and taxes are taken into consideration. Oldman, *supra* note 14.

educational and social outcomes for children.²⁵ Daycares represent a significant positive impact on the American public generally,²⁶ and the effect of a quality preschool program can be especially potent for certain socioeconomic classes and races.²⁷ There are even possible links to strong preschool support and participation as citizens.²⁸

III. ANALYSIS

A. Lack of Safety Requirements for Alabama's Children

American parents should expect certain safety standards from a resource of such importance. Common safety standards required of most daycares throughout the states include basic knowledge requirements, background checks, and inspections.²⁹ It is agreed that these standards are important and yet they are waived for religiously affiliated daycares.^{30,31}

²⁵ U.S. Bureau of the Census, Table 1b. Child Care Arrangements Preschoolers Living with Mother, by Employment Status of Mother and Selected Characteristics: Spring 2010 (Department of Commerce, 2011).

²⁶ U.S. Bureau of the Census, Table 1b. Child Care Arrangements Preschoolers Living with Mother, by Employment Status of Mother and Selected Characteristics: Spring 2010 (Department of Commerce, 2011).

²⁷ Potency effects of daycare of lower SES and different races, statistically much better for some than others; add more discussion about the failure/perceived failure of federal program HeadStart (cite).

²⁸ Early childhood education settings can and do affect later civic engagement behaviors by developing and emphasizing skills and traits such as prosocial behaviors in early childhood which persist across the lifespan. Jennifer Astuto & Martin D. Ruck, *Early childhood as a foundation for civic engagement*, in HANDBOOK OF RESEARCH ON CIVIC ENGAGEMENT IN YOUTH, 257–262 (2010)..

²⁹ For example, 47 states require day care center staff and 37 states require family child care providers to complete first aid training. 46 states require training of center staff and 36 require family child care providers to have a CPR certification. 27 states require center staff to complete training on child abuse and

neglect and 25 states require training regarding the prevention of communicable diseases. *Caring for Our Children Basics Health and Safety Foundations for Early Care and Education*, ADMINISTRATION FOR CHILDREN AND FAMILIES, (date), https://www.acf.hhs.gov/sites/default/files/ecd/caring_for_our_children_basics.pdf.

³⁰ A total of 16 states in the U.S. provide more lenient requirements for religious-affiliated day cares, while Alabama, Indiana, Missouri, Florida, North Carolina and waive almost all health and safety standards requirements for them. *Id.*

³¹ One article reporting on religious day care exemptions even pointed out that tattoo parlors come under more stringent health and safety centers than religious exempt day cares. (cite)

16 states in the United States as of right now apply differing licensure requirements while 5 offer religious exemptions to all or almost all licensure requirements.³² Previously, other states have added religious exemptions to day care licensures only to revoke the provision due to issues of abuse and neglect.³³

Alabama has a large number of children who are impacted by this failure to provide adequate safeguards. According to estimates from the United States Census Bureau, Alabama has a total of 218,813 children under 6 potentially needing childcare,³⁴ and around half of Alabama's daycares remain unlicensed as of September 2017.³⁵ The trend of daycares seeking religious exemptions in Alabama has not been studied in detail, although there are some troubling data points.³⁶ For example, of the 13 previously licensed daycare facilities which were closed between 2010 and 2014, 3 of them reopened as religiously affiliated exempt daycares.³⁷

Currently many of Alabama's children attend daycares which are not as safe as licensed daycares and provide little recourse for issues of abuse and neglect when they occur, and also provide little to no recourse for a center failing to comply with generally accepted practices.³⁸ Technically even exempt daycares must comply with certain requirements, such as background

³² *Id.*

³³ Two such states were Oklahoma and Texas. Oklahoma approved a law in 1953 for religious exemptions in licensure for child care facilities such as daycares and group residential facilities only to repeal the measure in 1963 after a particularly horrific location called Miracle Hill. Similarly, in Texas, a 1997 law provided for religious exemption from state licensure of daycares in exchange for licensure from a new committee, the Texas Association of Christian Child-Care Agencies. This initiative demonstrates issues with providing an alternate licensure route to religious entities—3 of the board members ended up being pastors of churches with childcare centers, likely influencing decision making, and secondly, the state found rates of physical abuse to be 25 percent higher at the religious daycares than secular ones, leading to the law's repeal in 2001. (cite)

³⁴ *Checking In: A Snapshot of the Childcare Landscape* (2017), http://usa.childcareaware.org/wp-content/uploads/2017/07/FINAL_SFS_REPORT.pdf.

³⁵ Vollers, *supra* note 2. About 943 centers in Alabama were exempt prior to passage of the Child Care Safety Act. *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Mattis, *supra* note 16.

checks, although there is little on the ground direct oversight or enforcement.³⁹

B. Legislative Failings to Fix the Issue

Recent efforts to introduce state legislation pulling religious day cares under general licensing efforts have failed to adequately fix the danger for the children of Alabama.⁴⁰ Such issues existed as the fact that the state lacked authority to routinely inspect or even shut down religious daycares.⁴¹ A new law enacted on March 27, 2018, the Child Care Safety Act, pulls more daycares under state licensure, specifically those which accept subsidies, but even up until passing was met with some resistance.⁴²

Interestingly, evidence suggests that religious organizations which operate daycares often do desire compliance with licensure requirements.⁴³ For example, a study conducted by the National Council of Churches found that a large proportion of church-housed child care sought and acquired some sort of state licensure even regardless of whether or not they were technically required.⁴⁴

According to Greg J. Mattis, this offers evidence “that a substantial proportion of church-sponsored day care providers share the same standards and strive for the same goals as secular day care providers,” and it may offer hope that resistance to

³⁹ Vollers, *supra* note 2.

⁴⁰ *Id.*

⁴¹ Prior to passage of the Child Care Safety Act on March 27, 2018, at best Alabama state Department of Human Resources could cut off subsidies to exempt daycares with safety concerns, but it lacked authority to shut it down or prevent them from transporting children. *Id.*

⁴² Daycares which receive federal or state subsidies now required to comport with state licensure requirements, although this still leaves roughly half of previously exempted daycares still exempt. WALA Webstaff, *Gov. Kay Ivey signs new Alabama day care bill*, WSFA (March 27, 2018), <http://www.wsfa.com/story/37818415/governor-ivey-signs-new-day-care-bill>. For example, Rep. Shelnett expressed concern about religious daycares having to choose as to whether or not to provide services to children who use subsidies based on the new licensure requirements. Mike Cason, *Lawmakers say Alabama's Child Care Safety Act will pass Thursday*, AL.COM (March 14, 2018), http://www.al.com/news/index.ssf/2018/03/lawmakers_say_alabamas_child_c.html

⁴³ Mattis, *supra* note 16.

⁴⁴ *Id.*

legislation on the national level might not be as contentious as one might initially believe.⁴⁵

Further, it is possible that some opposition may actually be due to a lack of education as to the scope of increased oversight when choosing to serve children who receive subsidies.⁴⁶

The question remains—what sort of national provision could exist which would effectively bring all daycares under the most basic supervision of the state (licensure with powers to shut down or suspend) without unduly infringing on religious and states' rights?

Mattis describes the Supreme Court's jurisprudence regarding religious accommodation as thus: "sometimes it is required, sometimes it is permitted, and sometimes it is prohibited."⁴⁷ Typically accommodations undergo 3-part Lemon test analysis, but this did not appear to apply clearly to religious exemptions until *Corporation of Presiding Bishop v Amos*, in which the Court evaluated the application of Lemon in the area of religious accommodations (specifically exemptions).⁴⁸

The Amos exemption analysis could fundamentally change the way in which courts handle Establishment Clause challenges to religious day care exemptions.⁴⁹

IV. CONCLUSION

Religious exemptions for daycares have the potential to significantly impact the general public in important ways. State efforts to effectively address this issue in states such as Alabama have been ineffective at best and negligent at worst. In states like Alabama, while some municipalities have taken it upon themselves to implement local ordinances to address this issue, statewide efforts remain necessary. Alabama attempted for a 3rd time to pass statewide legislation addressing this issue, and finally succeeded in passing the Child Care Safety Act; however, roughly a quarter of daycares in the state will continue to remain exempt

⁴⁵ *Id.* at 577.

⁴⁶ Rohacek, *supra* note 8.

A majority of the sample religious child care centers have at least one child who receives a subsidy. Among those that do not accept vouchers, they reasoned that their refusal to accept vouchers was based in large part on fear of the government impacting their teaching curricula, including religious instruction. *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

from licensure. More time is needed to determine what if any effects this new statute will have on the safety of children in care.

Given the nationwide significance of the daycare system, as well as the nationwide significance of interpreting the establishment clause and other federal laws relating to religion, a more comprehensive federal approach to this problem makes sense. The federal law tying federal subsidies to certain licensure requirements regardless of religious affiliation is a step in the right direction. Unfortunately for states such as Alabama, as many as half of the religiously exempted daycares do not accept federal funding and therefore do not fall under the scope of the licensing requirements.

It is possible that the discrepancy between perceived public outrage and broad support of paring back licensure exemptions and the outcomes in the state senate bill voting are reflective of general differences in the population. However it may also be possible that proponents of such exemptions are merely more vocal, since according to the NCC survey a majority of churches appear to align with the values that support licensure.