2016-028

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.ALABAMA.GOV

March 22, 2016

Honorable Jill Hall Lee
Shelby County District Attorney
Shelby County Courthouse
Post Office Box 706
Columbiana, Alabama 35051

District Attorneys – Sex Offenders Registration Act – Community Notification Act – Sex Offenders – Residence Requirements

A mothers' morning-out program operating less than four hours a day that is not licensed or certified by the Alabama Department of Human Resources or any other agency, or is specifically exempted by section 38-7-3 of the Code of Alabama, is not a childcare facility under section 15-20A-4(3) of the Code of Alabama.

Dear Mrs. Lee:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Is a mothers' morning-out program considered a "childcare facility" under section 15-20A-4(3) of the Code of Alabama when the facility is used to provide childcare and supervision by adults other than the children's natural parents or legal guardians to children younger than lawful school age for a period of less than four hours a day, and such childcare program facility is neither licensed by a state agency nor established as a specifically exempted

> facility pursuant to section 38-7-3 of the Code of Alabama?

FACTS AND ANALYSIS

This Office understands that the program in question is located in a church that has not sought an exemption from licensing by the Alabama Department of Human Resources ("DHR").

The Alabama Sex Offender Registration and Community Notification Act is found in sections 15-20A-1 through 15-20A-48 of the Code of Alabama. ALA. CODE §§ 15-20A-1 to 15-20A-48 (2011 & Supp. 2015). Section 15-20A-11(a) states the following:

> No adult sex offender shall establish a residence, maintain a residence after release or conviction, or establish any other living accommodation within 2,000 feet of the property on which any school, ***childcare facility***, or resident camp facility is located unless otherwise exempted pursuant to Sections 15-20A-23 and 15-20A-24.

ALA. CODE § 15-20A-11(a) (Supp. 2015) (emphasis added).

Section 15-20A-4(3) defines "childcare facility" as follows:

> A ***licensed*** child daycare center, a ***licensed*** childcare facility, or any other childcare service that is ***exempt from licensing pursuant to Section 38-7-3***, provided that the licensed child daycare center, licensed childcare facility, or any other childcare service and location are public record or have been provided to local law enforcement.

ALA. CODE § 15-20A-4(3) (Supp. 2015) (emphasis added).

You point out that, for purposes of licensing by DHR, a daycare center, child-care facility does not include "[k]indergartens or nursey schools or other ***daytime programs***, with or without stated educational purposes, ***operating no more than four hours a day*** and receiving

children younger than lawful school age." ALA. CODE § 38-7-2(4)b (2012) (emphasis added).

Nonetheless, whether a facility is a childcare facility for purposes of the sex offender registration laws turns, not on whether the facility qualifies for licensure, but on whether it has actually received a license or obtained an exemption. This Office has consistently stated that the term is limited to facilities required to be licensed or certified by DHR or any other agency, or those exempted by section 38-7-3 of the Code of Alabama. Opinions to Honorable James H. Hedgspeth, Jr., District Attorney, Etowah County District Attorney's Office, dated October 31, 2000, A.G. No. 2001-022; Honorable Joe W. Whisante, Sheriff, Madison County, dated November 13, 1998, A.G. No. 99-00039; Honorable Greg Wren, Member, Alabama House of Representatives, dated November 13, 1998, A.G. No. 99-00038.

You question the continued viability of this line of opinions in light of the fact that the laws on which they were based were repealed by the Sex Offender Registration and Community Notification Act. At the time of the *Whisante* and *Wren* opinions, the version of section 15-20A-11(a) in effect applied to property, in part, where a "licensed daycare center, or <u>any other child care facility</u> is located," without defining childcare facility. *Whisante*, at 2; *Wren*, at 2. Those opinions were based, in part, on the fact that law enforcement can easily determine these facilities by checking with DHR. The DHR licensure exemption provided for in section 38-7-3 is for preschool programs that are an integral part of a local church ministry or a religious nonprofit elementary school. ALA. CODE § 38-7-3 (2012). A church preschool may claim the exemption by filing annual written notice with DHR. Opinion to Honorable Bill Fuller, Commissioner, Alabama Department of Human Resources, dated April 24, 2001, A.G. No. 2001-160; *Whisante.*

By the time of the *Hedgspeth* opinion, however, a definition had been added consistent with the conclusion in the earlier opinions. The *Hedgspeth* opinion related the relevant law as follows:

> Section 15-20-26(a) of the Code of Alabama provides that "no adult criminal sex offender shall be allowed to establish a residence or accept employment within 2000 feet of the property on which any school or child care facility is located." ALA. CODE § 15-20-26(a) (Supp. 2000). Section 15-20-21(2) of the Code defines "child care facility" as "[a] ***licensed***

> daycare center, a ***licensed*** child care facility, or any other child care service that is ***exempt from licensing pursuant to Section 38-7-3.***" ALA. CODE § 15-20-21(2) (Supp. 2000).

Hedgspeth, at 1 (emphasis added). That definition was not substantively different than the current one in section 15-20A-4(3). Accordingly, the *Hedgspeth*, *Whisante*, and *Wren* opinions are reaffirmed.

CONCLUSION

A mothers' morning-out program operating less than four hours a day that is not licensed or certified by the Alabama Department of Human Resources or any other agency, or is specifically exempted by section 38-7-3 of the Code of Alabama, is not a childcare facility under section 15-20A-4(3) of the Code of Alabama.

I hope this opinion answers your question. If this Office can be of further assistance, please contact me.

Sincerely,

LUTHER STRANGE
Attorney General
By:

G. WARD BEESON, III
Chief, Opinions Section

LS/GWB

2113034/190763