



U.S. DEPARTMENT OF EDUCATION

FACT SHEET

ESEA Provisions Restricting Religious Organizations as Contract Providers of Equitable Services Are Unconstitutional

Background:

- Since the Elementary and Secondary Education Act (ESEA) was signed into law in 1965, eligible private school students and teachers have been entitled to equitable participation in a number of applicable Federal education programs authorized under the Act. Private school students have been included in formula counts to allocate funds for those programs.
- The equitable service provisions in the ESEA, as amended by the Every Student Succeeds Act (ESSA), require that a school district that receives certain Federal funds provide benefits to eligible private school students and teachers that are “equitable” to those provided to public school students and teachers. These services may be provided directly by the school district or through contracts with public or private individuals or organizations.
- ESEA Sections 1117(d)(2)(B) and 8501(d)(2)(B) require that an individual or organization that, through a contract with a public agency, provides equitable services to eligible private school students and teachers be “independent...of any religious organization.”
- The U.S. Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), held that, under the Free Exercise Clause of the First Amendment of the U.S. Constitution, otherwise eligible recipients cannot be disqualified from a public benefit solely because of their religious character.
- Under the [Executive Order 13798](#), the Department of Justice issued [guidance](#) to all administrative agencies regarding religious liberty protections in Federal law in October 2017. That guidance brings further attention to the enforcement of ESEA provisions regarding the restriction of religious organizations as contract providers of equitable services.

Key Points:

- The U.S. Department of Education (Department), in consultation with the U.S. Department of Justice, has determined that the statutory provisions requiring an equitable services provider to be “independent of ... any religious organization” (ESEA Sections 1117(d)(2)(B) and 8501(d)(2)(B)) are unconstitutional because they categorically exclude religious organizations (or affiliated persons) based solely on their religious identity from providing equitable services. These provisions therefore run afoul of the principles set forth in the Supreme Court’s decision in *Trinity Lutheran*.
- Thus, the Department is notifying Congress in a letter that, under these circumstances, it is no longer implementing these provisions. That means a school district may enter into a contract with a religious organization, such as a religiously affiliated college or university, to provide equitable services on the same basis as any other entity.
- The Department will continue to enforce all other applicable provisions of Federal law. In particular, a school district must continue to ensure that any contractor is independent of the

private school for which it is providing equitable services and that the educational services and other benefits being provided by the contractor are “secular, neutral, and nonideological” (ESEA Sections 1117(a)(2), 8501(a)(2)).

- This determination has no effect or bearing on the participation of eligible private school students and teachers in applicable ESEA programs and the responsibility of the school district to engage in timely and meaningful consultation with private school officials, allocate funds for equitable services properly, provide services that meet the needs of private school students and teachers, and assess the services provided.
- Subject to consultation with private school officials, a school district similarly retains the discretion as to whether to provide equitable services in whole or in part by contract.

Additional Details:

- Many religiously affiliated organizations provide secular educational programs, courses, and services that may meet the needs of both students and teachers. *Trinity Lutheran* places secular *and* religious organizations on a level playing field with respect to potentially serving as a school district’s contractor to provide all or a part of the equitable services provided to private school students and teachers.
- The statutory provisions requiring a contractor to be “independent...of any religious organization” are solely applicable to the provision of equitable services for private school students and teachers.
 - For example, based on this ESEA provision, a school district recently denied private school officials’ request for Title II, Part A professional services by a religiously affiliated university based on the grounds that the university was a “religious organization” and, thus, restricted from providing Title II, Part A services to private school teachers. Simultaneously, no Federal provision restricts that school district from contracting with the same religiously affiliated university to provide professional services to public school teachers.

Note: The Department’s draft non-regulatory guidance, *Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers and Families – Updated Non-Regulatory Guidance (2019)*, is available for public comment through March 26, 2019 at <https://www2.ed.gov/policy/elsec/leg/essa/draftessatitleiequitableservices.pdf>. The draft non-regulatory guidance includes questions consistent with this fact sheet on religious organizations as contractors of Title I equitable services.