

DeVos Lifts Bar on Religiously Affiliated Contractors Providing 'Equitable Services'

By [Alyson Klein](#) on March 11, 2019 3:35 PM

U.S. Secretary of Education Betsy DeVos announced Monday that her department will no longer enforce a restriction that prohibits religiously affiliated organizations from providing contracted services to private school students under the Elementary and Secondary Education Act.

Some background: Under ESEA, whose current version is the Every Student Succeeds Act, districts have to offer low-income or vulnerable students who attend private schools the same services that their public-school counterparts get. The law prohibits the money from going directly to say, Catholic schools, however. Instead, districts must consult with private school leaders to get a sense of their needs. Then they can provide the services themselves, or work with a contractor to offer them. The provision is known as "equitable participation," and it has been part of the law for decades.

But the provision as it is now implemented bars religious organizations from serving as contractors under the law. That runs counter to the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. vs. Comer*, DeVos and her team argue. The court decision found that a Missouri program that denied a church the opportunity to apply for a grant for playground resurfacing was unconstitutional.

The provision "impermissibly excludes a class of potential equitable service providers based solely on their religious status, just like the state policy that was struck down" in the *Trinity Lutheran* case, DeVos wrote in a letter to Congress explaining her decision. "It categorically excludes religious organizations simply because they are religious."

Importantly, though, under the change districts will still have the ultimate say over which contractors are used. And any services provided have to be completely secular and

non-ideological in nature. What's more, the contractor chosen can't be affiliated with the private school where the services are being offered.

Under ESSA, it's already OK for a religious organization (say a Catholic university) to provide services to a school district (say professional development for educators) using federal funds, a department official noted. The only prohibition in the law was on contractors working with private schools.

DeVos made the announcement at the Council for American Private Education (CAPE) annual meeting in Washington.

Elizabeth Hill, a spokeswoman for DeVos said the move "is further evidence of the secretary and the administration's commitment to making sure that schools are not discriminated against based on their religious affiliation."

But Jeff Simmering, the director of government relations for the Council of the Great City Schools, said he's still mulling the impact and legal implications of the change.

"I'm not saying it's incorrect, but it's a jump in legal logic to go from saying it's OK to provide funds to a contractor who is going to resurface a private school playground to a contractor that's going to provide instructional services," he said. "I'm sure we will all have an opportunity to think long and hard" about the impact of that, "because I'm sure it's going to be challenged."

Advocates who closely monitor the separation of church and state expressed concerns about the move.

"Betsy DeVos is neither the Supreme Court nor Congress. She does not get to unilaterally declare that a statute is unconstitutional, especially with a provision that is designed to protect church-state separation, a bedrock of our democracy," said Maggie Garrett, vice president for public policy at Americans United for Separation of Church and State, an advocacy organization. "Trinity Lutheran was an incredibly narrow decision that was about providing playground material to a church not about providing educational services to impressionable young schoolchildren."