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## / OFFICES

# Key Policy Letters Signed by the Education Secretary or Deputy Secretary

March 11, 2019

Honorable Nancy Pelosi  
Speaker of the House of Representatives  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to 28 U.S.C. § 530D, I write to notify you that I have determined that portions of sections 1117(d)(2)(B) and 8501(d)(2)(B) of the Elementary and Secondary Education Act of 1965 (ESEA), Public Law 89-10, codified as amended at 20 U.S.C. §§ 6320(d)(2)(B) and 7881(d)(2)(B), respectively, are unconstitutional in light of the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). The Attorney General's October 6, 2017, Memorandum on Federal Law Protections for Religious Liberty provided guidance to agencies about the First Amendment's prohibition on discrimination against religious organizations, and the Department of Education has identified these provisions as running afoul of that constitutional provision. Accordingly, the Department will refrain from enforcing, applying, or administering these provisions. As required under section 530D, I am sending this letter to the speaker of the House of Representatives, the majority leader and minority leader of the Senate, the majority leader and minority leader of the House of Representatives, the chairman and ranking minority member of the Committee on the Judiciary of the House of Representatives, the chairman and ranking minority member of the Committee on the Judiciary of the Senate, the Senate Legal Counsel, and the General Counsel of the House of Representatives. I also am sending this letter to the chairman and ranking member of the Senate Committee on Health, Education, Labor and Pensions and the House Committee on Education and Labor.

ESEA sections 1117 and 8501 require that, under specific ESEA programs, State and local educational agencies (SEAs and LEAs) provide services or other benefits to certain private school students, teachers, and families that are equitably comparable to those services provided in public schools. An SEA or LEA must provide equitable services either directly using its own employees or through a contract with an individual, association, agency, or organization. In providing such services, the statute requires that the employee or third-party provider must be "independent of the private school and of any religious organization." 20 U.S.C. §§ 6320(d)(2)(B), 7881(d)(2)(B)).

On June 26, 2017, the Supreme Court held in *Trinity Lutheran* that the Missouri Department of Natural Resources' policy of categorically disqualifying churches and other religious organizations from receiving grants under its playground resurfacing program violated the rights of Trinity Lutheran under the Free Exercise Clause of the First

Amendment by denying the church an otherwise available public benefit on account of its religious status. The Court explained that Missouri’s “policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character” and that “such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.” 137 S. Ct. at 2021.

After consultation with the Department of Justice, I have concluded that the requirement in ESEA sections 1117(d)(2)(B) and 8501(d)(2)(B) that an equitable services provider be “independent of . . . any religious organization” impermissibly excludes a class of potential equitable services providers based solely on their religious status, just like the State policy that was struck down in *Trinity Lutheran*. It categorically excludes religious organizations simply because they are religious. This status-based prohibition also cannot be justified under *Locke v. Davey*, 540 U.S. 712 (2004), which held that the government may decline in some circumstances to fund religious *activity*. Although the ESEA provisions in question may have been intended to advance the separation of church and state, the *Trinity Lutheran* Court expressly stated that such concerns do not provide sufficient justification for status-based discrimination against religious organizations. 137 S. Ct. at 2024.

Permitting religious organizations and secular organizations alike to provide secular services to schools does not violate the Establishment Clause, and absent specific language to the contrary (e.g., ESEA sections 1117(d)(2)(B) and 8501(d)(2)(B)), the Department generally considers faith-based organizations to be eligible to contract with grantees and subgrantees and to apply for and receive Department grants on the same basis as any other private organization. See 2 C.F.R. § 3474.15(b)(1); 34 C.F.R. § 72.52(a)(1). Of course, the Department will continue to implement all other provisions of ESEA, including the requirement that all equitable services be “secular, neutral, and nonideological.” 20 U.S.C. §§ 6320(a)(2), 7881(a)(2).

Going forward, the Department will decline to enforce the specific requirement that an equitable services provider be “independent . . . of any religious organization” but will continue to enforce all other provisions of ESEA sections 1117 and 8501 as written.

Sincerely,

/s/

Betsy DeVos

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Last Modified: 03/11/2019

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