Frequently Asked Questions on the Maintenance-of-Effort Requirements Applicable to the CARES Act Programs

U.S. Department of Education
Washington, D.C. 20202

May 2020

Purpose of this Document

The purpose of this document is to answer questions about the State maintenance-of-effort (MOE) requirements under the CARES Act.[1] The CARES Act creates funding streams for several programs that address the educational impact of the Novel Coronavirus Disease 2019 (COVID-19). Under two of these programs – the Governor's Emergency Education Relief Fund (GEER Fund, Section 18002)) and the Elementary and Secondary School Emergency Relief Fund (ESSER Fund, Section 18003) – States are required to maintain fiscal effort on behalf of elementary, secondary and postsecondary education.

Many questions about MOE can be answered with a plain read of section 18008 of the CARES Act, reprinted below for convenience:

> **MAINTENANCE OF EFFORT**
> SEC. 18008.
> (a) A State's application for funds to carry out sections 18002 or 18003 of this title shall include assurances that the State will maintain support for elementary and secondary education, and State support for higher education (which shall include State funding to institutions of higher education and state need-based financial aid, and shall not include support for capital projects or for research and development or tuition and fees paid by students) in fiscal years 2020 and 2021 at least at the levels of such support that is the average of such State's support for elementary and secondary education and for higher education provided in the 3 fiscal years preceding the date of enactment of this Act.
> (b) The secretary may waive the requirement in subsection (a) for the purpose of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.

Recipients of the resources from the ESSER Fund and the GEER Fund have signed Certifications and Agreements, where they agree to abide by the provisions of the CARES Act, including MOE requirements. Generic versions of the Certifications and Agreements can be found here for the GEER Fund: https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/ and here for the ESSER Fund: https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/.

[1] Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (Mar. 27, 2020). All citations in this document are to the CARES Act, unless otherwise indicated. The provisions of the CARES Act relevant to the GEER Fund, ESSER Fund and other Department of Education CARES Act programs are available on the Department's website at https://oese.ed.gov/offices/education-stabilization-fund/.

Disclaimer

Other than statutory and regulatory requirements included in the document (such as those pursuant to the authorizing statute and other applicable laws and regulations), the contents of the guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. In addition, it does not create or confer any rights for or on any person.

If you have questions that are not answered in this document, please e-mail geerf@ed.gov for the GEER Fund and esserf@ed.gov for the ESSER Fund.

Table of Contents

MAINTENANCE-OF-EFFORT REQUIREMENTS APPLICABLE TO CARES ACT PROGRAMS 1

1. What are the maintenance of effort (MOE) requirements that apply to the CARES Act Programs? 1

2. What is meant by the term "fiscal year" in determining MOE? 1

3. What three fiscal years must a State average in calculating the "floor" or comparison level for determining MOE? 1

4. How does a State quantify the amount of its support for elementary and secondary education? 2

5. What resources are publicly available to assist a State in determining the levels of support for elementary and secondary education? 3

6. May a State demonstrate support for elementary and secondary education on either an aggregate or a per-student basis? 3

7. How does a State quantify the amount of its support for higher education? 3

8. May a State demonstrate support for higher education on either an aggregate or a full-time-equivalent (FTE) basis? 5

9. What resources are publicly available to assist States in determining their levels of State support for higher education? 5

10. When will the Department collect a State's baseline MOE data (i.e., the data demonstrating the State's level of support for elementary and secondary education and for higher education for FYs 2017, 2018, and 2019)? 6

11. When will the Department collect data on a State's level of support for elementary and secondary education and for higher education for FYs 2020 and 2021? 6

12. May the Secretary waive the CARES Act programs MOE requirements? 6

13. When does the Department anticipate reviewing requests for waivers of the CARES Act programs MOE requirements? 6

14. What does it mean for a State to experience "a precipitous decline in financial resources"? 6

15. What information and data might the Secretary consider when reviewing MOE waiver requests? 7

16. What is the penalty if a State is not able to demonstrate that it maintains fiscal effort consistent with the requirements of the CARES Act and does not receive a waiver of those requirements from the Secretary? 7

APPENDIX A: MAINTENANCE-OF-EFFORT BASELINE DATA 8

Maintenance-of-Effort Requirements Applicable to CARES Act Programs

1. What are the maintenance of effort (MOE) requirements that apply to the CARES Act Programs?

As a recipient of GEER or ESSER funds, both the Governor and the State educational agency, respectively, assure that the State will maintain support during fiscal years (FYs) 2020 and 2021 for elementary and secondary education, as well as support for higher education under Section 18008(a) of the CARES Act.[2]

- Elementary and Secondary Education MOE Requirement: A State must maintain support for elementary and secondary education in each of fiscal years (FY) 2020 and 2021 at least at the level of such support that is the average of the support for elementary and secondary education provided in the three fiscal years preceding the date of enactment of the CARES Act (FYs 2017, 2018, 2019). *See* FAQs 2 and 3.

- Higher Education MOE Requirement: A State must maintain support for higher education in each of FYs 2020 and 2021 at least at the level of such support that is the average of the State's support for higher education provided in the three fiscal years preceding the date of enactment of the CARES Act (FYs 2017, 2018, 2019). *See* FAQs 2 and 3.

2. What is meant by the term "fiscal year" in determining MOE?

For purposes of determining MOE, a State may use either the applicable Federal fiscal years (which run from October 1 through September 30) or the applicable State fiscal years. If using the applicable State fiscal year (generally July 1, 2019 to June 30, 2020), FY 2020 is the State fiscal year that aligns with school year (SY) 2019-2020. FY 2021 is the State fiscal year (generally July 1, 2020 to June 30, 2021) that aligns with SY 2020-2021.

3. What three fiscal years must a State average in calculating the "floor" or comparison level for determining MOE?

To establish a baseline for determining MOE, a State must calculate separately the average support for elementary and secondary education and for higher education for the three fiscal years prior to enactment of the CARES Act (March 27, 2020). Those fiscal years are FY 2017 (generally SY 2016-2017), FY 2018 (generally SY 2017-2018), and FY 2019 (generally SY 2018-2019).

[2] For purposes of this document, the GEER Fund and the ESSER Fund are referred to collectively as CARES Act programs.

4. How does a State quantify the amount of its support for elementary and secondary education?

The CARES Act does not define how the State would determine its "support for elementary and secondary education" for the purposes of the MOE requirement, and the Department is not defining this term through regulation. Rather, in recognition of the variations in education finance data and the lack of a statutory definition, the Department is providing States with principles that provide flexibility in quantifying the amount of that support.

In quantifying its support for elementary and secondary education, the data used by the State to determine the level of support must—

- Include funds provided through the principal funding mechanisms through which a State provides support for elementary and secondary education.

- Be consistent from year to year.

- Be based on adequate documentation that substantiates the levels of support that it has used in making MOE calculations.

In quantifying support for elementary and secondary education, the State may choose to establish its level of support—

- Solely on the basis of the amount of funds provided through its primary elementary and secondary education funding formula(e).

- By including categorical and other support that is not provided through the primary funding formula(e). For example, a State may include data such as funding under State auspices for non-appropriated support (e.g., tobacco settlement funds and lotteries) specifically set aside for current expenditures for elementary and secondary education and interest or earnings received from State endowments pledged to elementary and secondary education.

- On the basis of data that it provides for other purposes, such as data that it includes as "Revenue from State Sources" in the annual National Public Education Finance Survey conducted by the National Center for Education Statistics (NCES).

In quantifying support for elementary and secondary education, the data used by the State to determine the level of support may *not*—

- Include support from private donors, such as charitable contributions that individuals make to elementary and secondary education.

- Include Federal funds.

5. What resources are publicly available to assist a State in determining the levels of support for elementary and secondary education?

One way a State may choose to quantify the level of support for elementary and secondary education is to report the same information a State includes as "Revenue from State Sources" in the National Public Education Finance Survey (NPEFS). (*See* https://nces.ed.gov/ccd/stfis.asp and http://nces.ed.gov/ccd/pdf/NPEFSmanual2004.pdf.) This is a survey of States that is conducted annually by the National Center for Education Statistics. NPEFS identifies four types of State support for LEAs:

- Unrestricted Grants-in-Aid: State grants to local educational agencies (LEAs) that can be used, without restriction, for any legal purpose desired by the LEA;

- Restricted Grants-in-Aid: State grants to an LEA that must be used for a "categorical" or specific purpose;

- Revenue in Lieu of Taxes: Commitments or payments made out of general revenues by a State to an LEA in lieu of taxes that the State would have had to pay had its property or other tax base been subject to taxation on the same basis as privately owned property. This revenue includes payments in lieu of taxes for privately owned property that is not subject to taxation on the same basis as other privately owned property because of action(s) taken by a State; and

- Revenue for, or on Behalf of, the LEA: State commitments or payments for the benefit of an LEA and contributions of equipment and supplies. Such revenue includes payments made for, or on behalf of, an LEA by a State to a pension fund for LEA employees.

6. May a State demonstrate support for elementary and secondary education on either an aggregate or a per-student basis?

Yes. In comparing the level of support for elementary and secondary education in each of FYs 2020 and 2021 with the level of such support for the average of FYs 2019, 2018, and 2017, a State may measure support on either an aggregate or per-student basis. If a State demonstrates support on an aggregate basis, i**.**t is not necessary for a State to maintain its level of support for individual categories of activities.

7. How does a State quantify the amount of its support for higher education?

Although the CARES Act excludes certain data from the MOE determination, it does not define how the State would determine its "support for higher education," and the Department is not defining this term through regulation. Rather, in recognition of the variations in the types of support for higher education and the lack of a statutory

definition, the Department is providing States with principles that provide flexibility in quantifying the amount of that support.

In quantifying support for higher education, the data used by the State to determine the level of support must—

- Include only *State* support for higher education. In some States, local governments may provide support for community colleges or other institutions of higher education (IHEs). Local government contributions are not considered State support.

- Include funds provided by the principal funding mechanisms through which a State provides support to IHEs. For example, the data would include State appropriations for higher education. A State must consider unrestricted State funding for IHEs to be State support for such institutions even if those institutions choose to use a portion of that funding for financial assistance to students. This financial assistance is not considered to be tuition and fees paid by students or direct State support to students.

- Include State need-based financial aid.

- Be consistent from year to year.

- Be based on adequate documentation that substantiates the levels of support that it has used in making MOE calculations.

In quantifying support for higher education, the data used by the State to determine the level of support may—

- Include data in addition to that provided in the appropriations enacted by the State legislature for IHEs. For example, a State may include data such as funding under State auspices for non-appropriated support (e.g., tobacco settlement funds and lotteries) specifically set aside for higher education and interest or earnings received from State endowments pledged to IHEs.

- Include State appropriations to IHEs for financial assistance programs to defray the costs of tuition and fees paid by students (when the appropriated funds flow directly to the IHEs). The fact that the funds represent student financial aid for other purposes does not preclude such funds from consideration as State support for higher education in the CARES Act programs.

In quantifying support for higher education, the data used by the State to determine the level of support may *not* include—

- Support for capital projects, research and development, or tuition and fees paid by students. If a State provides unrestricted State funding to IHEs and does not make separate appropriations for capital expenditures or research and development, the

State must estimate the amount of capital expenditures and research and development expenditures to be excluded from the unrestricted funding.

- Support from private donors, such as charitable contributions that individuals make to IHEs. This includes corporate contributions for IHEs, such as payments that a corporation makes for stadium-naming rights.

- Federal funds.

8. May a State demonstrate support for higher education on either an aggregate or a full-time-equivalent (FTE) basis?

Yes. In comparing the level of support for education in each of FYs 2020 and 2021 with the level of such support for the average of FYs 2019, 2018, and 2017, a State may measure support on either an aggregate basis or on a FTE enrollment basis. If a State demonstrates support on an aggregate basis, it is not necessary for a State to maintain its level of State support for individual categories of activities.

9. What resources are publicly available to assist States in determining their levels of State support for higher education?

One way a State may quantify State support for IHEs is to use the definitions from the SHEF study conducted by SHEEO, an annual data collection of all State and local revenue used to support higher education. (*See* https://shef.sheeo.org/report/). In that study, SHEEO identifies the following as State revenue sources for public IHEs:

- State tax appropriations set aside specifically to support public higher education;

- Funding under State auspices for appropriated non-tax support (e.g., tobacco settlement funds and lotteries) specifically set aside for public higher education; and

- Interest or earnings received from State endowments pledged to public IHEs.

10. When will the Department collect a State's baseline MOE data (i.e., the data demonstrating the State's level of support for elementary and secondary education and for higher education for FYs 2017, 2018, and 2019)?

The Department will collect baseline MOE data by September 1, 2020. See Appendix A for the information that will be required in a State's initial MOE submission to the Department.

11. When will the Department collect data on a State's level of support for elementary and secondary education and for higher education for FYs 2020 and 2021?

The Department intends to collect data on a State's level of support for FY 2020 and FY 2021 approximately 90 days after the close of the respective fiscal years.

12. May the Secretary waive the CARES Act programs MOE requirements?

Yes. Under section 18008(b) of the CARES Act, the Department may waive the elementary and secondary MOE requirement and the higher education MOE requirement for the purposes of relieving fiscal burdens on States that have experienced a precipitous decline in financial resources.

13. When does the Department anticipate reviewing requests for waivers of the CARES Act programs MOE requirements?

The Department anticipates reviewing requests for waivers of the CARES Act MOE requirements at the end of FY 2021 (i.e., after September 2021). At that time, the Department will consider any requests for waivers related to the State's FY 2020 and 2021 levels of support. This timeframe will allow the Department to consider the waivers in the context of each State's effort to maintain support for elementary and secondary education and higher education with a full understanding of the economic impact of COVID-19 on State and local revenues and subsequent funding decisions. This will also eliminate the need for a State to file more than one waiver request.

14. What does it mean for a State to experience "a precipitous decline in financial resources"?

The CARES Act does not define the term "precipitous" and the Department does not intend to issue regulations on the statutory MOE requirements in section 18008(a) or the Secretary's waiver authority in section 18008(b). In considering whether a given State has had a precipitous decline in financial resources, the Department will rely on the plain meaning of the word "precipitous." In other words, the Department will consider whether there has been an abrupt, steep drop in financial resources available for State effort to support elementary, secondary and postsecondary education.

15. What information and data might the Secretary consider when reviewing MOE waiver requests?

In reviewing a request for an MOE waiver, the Secretary will first determine, based on financial data provided by the State, whether the State has experienced a precipitous decline in financial resources. That information would include, for example, data on State revenues from the base years (FY 2017 to FY 2019) and the MOE comparison years (FY 2020 and FY 2021 years). To the extent that a State uses both State and local contributions to establish its levels of support for elementary and secondary education, the information would include data on both State and local revenues.

If a State demonstrates that it failed to maintain fiscal effort as a result of a precipitous decline in financial resources, the Secretary will then determine whether to grant the State a waiver of the MOE requirements based on considerations including but not limited to the following:

- Whether the percentage of State revenues spent on elementary and secondary education in FYs 2020 and 2021 is at least as high as the percentage prior to the coronavirus pandemic.

- Whether the percentage of State revenues spent on higher education in FYs 2020 and 2021 is at least as high as the percentage prior to the coronavirus pandemic.

- Whether the decreases in support for education were due to the COVID-19 pandemic.

- Whether the State took steps to ameliorate its levels of support for education from State FY 2020 to State FY 2021.

16. What is the penalty if a State is not able to demonstrate that it maintains fiscal effort consistent with the requirements of the CARES Act and does not receive a waiver of those requirements from the Secretary?

If a State fails to meet the MOE requirements and does not receive an MOE waiver, the Department generally would be entitled to recover the full amount of a State's GEER Fund and ESSER Fund awards. There may be circumstances that justify other appropriate enforcement actions, which may include placing additional grant conditions on a State's CARES Act programs under 2 C.F.R. § 200.207, designating an entity as a high-risk under 2 C.F.R. § 3474.10, and withholding of CARES Act funds under section 455 of the General Education Provisions Act.

Appendix A: Maintenance-Of-Effort Baseline Data

State _____

1. **Levels of State support for elementary and secondary education** *(enter amounts for each year)*:

   FY 2017 **$_____**

   FY 2018 **$_____**

   FY 2019 **$_____**

   Average **$_____**

2. **Levels of State support for higher education** *(enter amounts for each year)*:

   FY 2017 **$_____**

   FY 2018 **$_____**

   FY 2019 **$_____**

   Average **$_____**

3. **Additional submission requirements**: In an attachment —

   (a) Identify and describe the data sources used in determining the levels of State support for elementary and secondary education; and

   (b) Identify and describe the data sources used in determining the levels of State support for higher education.