Maintenance of Effort Requirements for Federal COVID-19 Education Funds

Updated May 2022

Summary

This document explains variations in the maintenance of effort (MOE) requirements connected to federal COVID-19 aid for education, including the more "traditional" MOE defined under the CARES Act and the less conventional "proportional" MOE used in CRRSAA and ARPA, as well as articulates why the latter MOE design is problematic for many states. To meet the traditional MOE in the CARES Act, states are required to maintain state support for K-12 education and higher education at pre-pandemic levels (the 3-year average of fiscal years 2017, 2018 and 2019), as measured in nominal dollars. That is, if a state spent $3 billion on K-12 education before the pandemic, it must have spent at least $3 billion on K-12 education in fiscal 2020 and fiscal 2021. In contrast, under the proportional MOE, states are required to maintain state support for K-12 education and higher education at pre-pandemic levels, as measured as a share of overall state spending. That is, if a state spent 30 percent on K-12 education as a share of its total budget before the pandemic, it must spend at least 30 percent of its budget on K-12 education in fiscal 2022 and fiscal 2023. According to a NASBO member survey conducted in February 2022, a majority of respondents expressed concern about their states' ability to comply with this proportional MOE requirement.

Background

Maintenance of effort (MOE) provisions are sometimes included in federal grant legislation and generally require a recipient of federal funds to maintain a certain level of financial support from their own revenue sources for a given program area as a condition of receiving a federal grant for that same program area. During the pandemic, the Elementary and Secondary School Emergency Relief (ESSER) program has provided several rounds of education funding to states in various COVID-19 relief bills, and each round has included an MOE requirement. However, these MOE requirements have not all been structured in the same way.

MOE Requirement in CARES Act

The MOE provision that applied to the first round of ESSER, as well as the Governor's Emergency Education Relief (GEER) Fund, in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) required states to maintain elementary and secondary education (K-12) spending and higher education spending in fiscal years 2020 and 2021 equal to the three-year average of actual expenditures for these areas in fiscal years 2017, 2018, and 2019. For example, if a state spent $10 billion in state (non-federal) funds on K-12 education, on average, in fiscal 2017, 2018 and 2019, it would be required to spend that same amount of money from state funds ($10 billion) in fiscal 2020 and fiscal 2021. This is in line with how MOE requirements have generally been defined in the past.

MOE Requirement in CRRSAA and ARPA

In contrast to the CARES Act, the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA), 2021 (Division M of H.R. 133) required states receiving ESSER II funds, as well as funds from GEER II and the new Emergency Assistance to Non-Public Schools (EANS), to maintain support for elementary and secondary education (K-12) and for higher education in fiscal year 2022 "at least at the proportional levels of such state's support for elementary and secondary education and for higher education relative to such state's overall spending, averaged over fiscal years 2017, 2018, and 2019." The ESSER program in the American Rescue Plan Act of 2021 (ARPA) included the same proportional MOE language for fiscal years 2022 and 2023. Under this altered definition, if a state spent 40 percent of its budget from state (non-federal) funds on K-12 education and 9 percent on higher education in fiscal 2017, 2018 and 2019, on average, then the state would be required to spend at least 40 percent of its budget on K-12 and 9 percent on higher education in fiscal 2022 and fiscal 2023 as well to comply. ARPA also included new Maintenance of Equity requirements, which are discussed briefly later in this document.

ED Implementation of MOE Requirements and Waiver Authority

The U.S. Department of Education (ED) first issued guidance on the MOE included in CRRSAA and ARPA on April 21, 2021. This initial guidance clarified some key points – for example, states would need to meet the proportional MOE requirements for K-12 education and higher education separately and could not combine the two in their calculations. The current guidance document was last updated on February 4, 2022 to clarify that states could include Coronavirus Relief Funds (CRF) under the CARES Act and Coronavirus State Fiscal Recovery Funds (SFRF) under ARPA that are spent on K-12 education or higher education as state support in their MOE calculations. For SFRF, only funds claimed for revenue replacement that are spent on education are eligible to be counted as state support.

Under ARPA, the U.S. Secretary of Education is given the authority to waive any MOE requirement associated with the Education Stabilization Fund (including the rounds of ESSER funds under preceding legislation) "for the purpose of relieving fiscal burdens incurred by States in preventing, preparing for, and responding to the coronavirus." So far, ED has received MOE waiver requests from 13 states and one territory for one or more applicable fiscal years; among those requests, five were subsequently withdrawn while the remaining are under review. Virtually all requests submitted thus far are for fiscal years 2022 and/or 2023 under CRRSAA and ARPA, with more state waiver request submissions for those years expected in the future.

The timeline for CRRSAA and ARPA MOE data submissions and waiver requests is outlined in ED guidance as follows:

- FY 2022 Data: States were required to submit interim data on appropriated amounts for K-12 state support, higher education state support, and overall state spending by December 30, 2021. States must submit final expenditure data for FY 2022 overall state spending in spring 2023.
- FY 2023 Data: States must submit interim data on appropriated or allocated amounts for K-12 state support, higher education state support, and overall state spending by December 30, 2022. States must submit final expenditure data for FY 2023 overall state spending in spring 2024.
- States may request a waiver of MOE requirements when they have the data to demonstrate that they are unable to comply for FY 2022 or FY 2023, which generally will not be possible until the state has actual expenditure data for overall state spending for the applicable fiscal year(s).
    - ED may consider waiver requests that use projected data based on appropriation levels and may make a preliminary waiver determination before final expenditure data are available on a case-by-case basis.

The MOE and State Fiscal Conditions

Why was the structure of the MOE changed? According to a U.S. Department of Education (ED) official delivering briefings for State School Officers and Governors' Education Policy Advisors in January 2021, the intent of the revised MOE requirement in the CRRSA Act was to provide states greater flexibility to reduce spending on education as needed in response to declining financial resources. At the time the CRRSA Act was drafted, states were still estimating considerable revenue losses due to the economic impacts of COVID-19, and policymakers expected that many states would need to make spending cuts to balance their budgets. Under the CRRSA Act (and ARPA) MOE provision, states could reduce spending on education so long as the cuts were proportionate to the overall reduction in state spending.

Instead of facing revenue losses, however, states experienced robust revenue gains in fiscal 2021, and this strong growth has continued into fiscal 2022, with much of these gains considered to be one-time in nature. Fortunately, this improvement in fiscal conditions has enabled states to make needed investments in education as well as health care, human services, transportation and infrastructure, and other key areas. Paradoxically, while the proportional MOE was intended to provide states more flexibility in a budget-cutting environment, it has led to far less flexibility for states to make financially sustainable, data-informed, needs-based budget decisions in the current fiscal environment.

State Concerns about Proportional MOE are Widespread

Many states are concerned about their ability to meet the MOE requirements in CRRSAA and ARPA for K-12 education, higher education or both areas. In a recent survey of state budget directors conducted by NASBO in February 2022, respondents were asked, “Are you concerned about your state’s ability to meet the MOE requirements for the ESSER funds in ARPA?” Based on responses from 43 states and 1 territory, 24 responded “yes”, 12 responded “no” and 8 responded “unsure”. See results in **Figure 1**.

In contrast, very few states had difficulty meeting the MOE requirements under the CARES Act in fiscal 2020 and fiscal 2021, which simply measured whether states had maintained K-12 spending and higher education spending (in nominal dollars) at or above pre-pandemic baseline levels.

Why is the Proportional MOE Requirement Problematic for States?

One reason so many states are concerned about their ability to meet the proportional MOE provision in CRRSAA and ARPA is these requirements do not account for rising spending needs in other areas of the state budget, which are often outside the control of state policymakers. Even before the pandemic, many states were seeing rising spending pressures in Medicaid and other health care programs due to an aging population and other external factors. These trends were exacerbated further by the impacts of the pandemic, leaving states facing increased health and human services costs. State lawmakers and the governor often have less discretion in setting these funding amounts, which are driven by caseload increases. The proportional MOE provision greatly complicates the state budget process, requiring states that put more money towards addressing other program area needs to ensure they are also increasing spending on K-12 education and higher education at an identical rate. Not only could this lead to a less efficient allocation of resources, but this could also penalize states for making necessary – and in many cases, legally required – investments in non-education areas of the budget. Even an additional investment in one area of education (such as K-12) could result in the state having greater difficulty meeting the proportional MOE requirement in another education area (such as higher education).

To illustrate this point, see the following examples below:

State A

Suppose State A’s baseline spending amounts (the average over fiscal years 2017, 2018, and 2019) were as follows:

Overall state spending = $50 billion

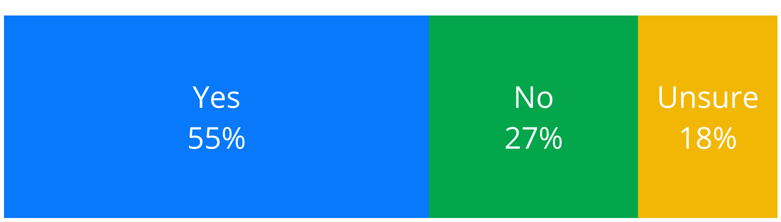
K-12 education spending = $15 billion (30 percent)

Higher education spending = $5 billion (10 percent)

When State A put its budget together for fiscal 2022 (which for many states, occurred before ED issued initial MOE guidance),

Figure 1.

Are you concerned about your state’s ability to meet the MOE requirements for ARP ESSER funds?*



** Source: National Association of State Budget Officers (NASBO), member Survey conducted in February 2022. Results are based on responses received from 43 states and 1 territory. 24 states/territories responded “yes”; 12 responded “no”; and 8 responded “unsure”.*

it determined it had sufficient financial resources to cover $60 billion in overall state spending, compared to $55 billion in fiscal 2021 – a 10 percent annual increase.

For fiscal 2022, State A's spending figures are as follows:

Total state funds budget = $60 billion

K-12 education spending = $18 billion (30 percent)

Higher education spending = $5.5 billion (9.2 percent)

While State A just barely meets the requirement for K-12 education, it fails to meet the MOE for higher education, as its share of the overall budget dropped from 10 percent to 9.2 percent. While the state has consistently increased funding for colleges and universities year-over-year, these increases have been outpaced by growth in other areas of the budget, such as health and human services. To meet the MOE for higher education, State A would need to invest an additional $500 million in higher education. As the state has limited resources, this would require the state to cut back in other areas to put more money into higher education, but since much of the increases in the budget are fixed costs driven by pre-existing requirements in state or federal law, state policymakers' ability to remedy the situation is restricted.

State B

As another example, suppose State B's baseline spending amounts (the average over fiscal years 2017, 2018, and 2019) were as follows:

Overall state spending = $20 billion

K-12 education spending = $5 billion (25 percent)

Higher education spending = $2 billion (10 percent)

Shortly before the pandemic, in 2019, State B passed legislation to raise additional revenue, which would be dedicated to increasing investment in K-12 education over a multiyear period, beginning in fiscal 2020. By the time the state adopted its budget for fiscal 2022, the state was projecting to spend the following based on enacted appropriations:

Overall state spending = $24 billion

K-12 education spending = $8 billion (33.3 percent)

Higher education spending = $2.3 billion (9.6 percent)

While State B easily meets the MOE requirement for K-12, it fails to meet the higher education MOE, even though the state has increased spending in this area by $300 million since the baseline years. Moreover, State B's higher education spending would have likely maintained its share of the budget from the baseline years were it not for the additional revenue and investment in K-12 education that was approved pre-pandemic. Effectively, by investing additional funds into K-12 education, the state risks not being able to meet the MOE requirement for higher education.

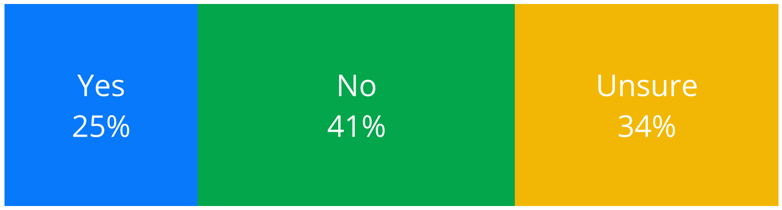
Maintenance of Equity Requirements

In addition to MOE requirements, ARPA established "maintenance of equity" (MOEquity) provisions as a condition for states and local educational agencies (LEAs) to receive ESSER funds under ARPA. Under this new set of fiscal requirements, states may not disproportionately reduce per-pupil state funding to "high-need" LEAs, nor may they reduce per-pupil funding to the "highest poverty" LEAs below their fiscal 2019 level. "High-need" LEAs are defined as school districts with the highest percentages of economically disadvantaged students, in rank order, that collectively serve at least 50 percent of total enrolled students in LEAs in the state. "Highest-poverty" LEAs have the highest percentages of economically disadvantaged students in the state and collectively serve at least 20 percent of total enrolled students in LEAs in the state. There are also MOEquity requirements imposed directly on LEAs to not disproportionately reduce per-pupil funding or full-time equivalent (FTE) staff per-pupil in high-poverty schools. ED first released guidance for the MOEquity provisions on June 9, 2021 and released updated guidance on August 6. The guidance revisions were prompted by comments from states about their technical limitations to fully implement aspects of the statute, as further described in a letter to chief state school officers and school district superintendents.

States are still analyzing data to determine their compliance with these requirements. NASBO's February 2022 survey of state budget directors asked, "Are you concerned about your state's ability to meet the maintenance of equity requirements for the ESSER funds in ARPA?" A majority of states reported they were either concerned or unsure about their ability to meet the MOEquity requirements. (See full results in **Figure 2.**)

Figure 2.

Are you concerned about your state's ability to meet the MOEquity requirements for ARP ESSER funds?*



** Source: National Association of State Budget Officers (NASBO), Member survey conducted in February 2022. Results are based on responses received from 43 states and 1 territory. 11 states/territories responded "yes"; 18 responded "no"; and 15 responded "unsure".*

Conclusion and Next Steps

As discussed above, the proportional MOE requirements attached to ESSER funds in CRRSAA and ARPA differ from the traditional MOE that was included in the CARES Act. Requiring states to ensure the same proportion of their total budget be spent on K-12 education and higher education each year can be problematic for numerous reasons, even for states that are projecting year-over-year increases in education spending. Absent a legislative fix, states unable to comply with the proportional MOE can request a waiver of the requirement from the U.S. Department of Education, as some states already have done. At this time, ED has not conveyed a timeline for how quickly it will issue decisions on MOE requests nor any specifics on what the consequences of noncompliance will be but notes in guidance "the Department could seek recovery of funds."

If you would like additional information, please contact Kathryn Vesey White at kwhite@nasbo.org or 202-624-5949.

Federal Guidance and Related Resources:

Maintenance of Effort Guidance (February 4, 2022)

Maintenance of Equity Guidance (August 6, 2021)

ARP ESSER Performance and Reporting Page – includes MOE Waiver Request Submissions

Maintenance of Equity Resources Page – includes States' Baseline and Initial Data Submissions

ARP ESSER Resources Page – includes links to guidance on Use of Funds and other aspects of the program, webinar recordings and other technical assistance materials