

Guidance on the Maintenance-of-Effort Requirements in the State Fiscal Stabilization Fund Program



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Purpose of the Guidance

This guidance supplements the April 2009 Guidance on the State Fiscal Stabilization Fund program and provides additional information on the statutory maintenance-of-effort (MOE) requirements and the process through which a State applies for an MOE waiver. The guidance provides the U.S. Department of Education's interpretation of the referenced statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

The Department will provide additional or updated program guidance as necessary. If you are interested in commenting on this guidance, please send your comments to State.Fiscal.Fund@ed.gov.

Introduction

Under the State Fiscal Stabilization Fund (Stabilization) program, a State must maintain State support for elementary and secondary education, in each of fiscal years (FYs) 2009, 2010, 2011, at least at the level that the State provided in FY 2006. Similarly, a State must maintain State support for public institutions of higher education (IHEs) (not including support for capital projects or for research and development or tuition and fees paid by students), in each of FYs 2009, 2010, and 2011, at least at the level of such support in FY 2006. (*See* Section 14005(d)(1) of the American Recovery and Reinvestment Act of 2009 (ARRA).)

The ARRA authorizes the Secretary of Education to waive these maintenance-of-effort (MOE) requirements if a State demonstrates that it has provided for elementary, secondary, and public higher education, for the fiscal year under consideration, a percentage of the total revenues available to the State that is equal to or greater than the percentage provided for that purpose in the preceding fiscal year. (*See* Section 14012(c) of the ARRA.) Unless a State receives a waiver, a State must meet both the elementary and secondary education MOE requirements and the public IHE MOE requirements for each of the applicable years. The U.S. Department of Education (Department) will closely examine whether a State is complying with these requirements, or, if the State seeks an MOE waiver, whether it meets the MOE waiver criterion. The Department will post on its website State MOE data as well State requests for MOE waivers.

State Support for Elementary and Secondary Education

There are considerable variations in the formulae and other mechanisms that States use in providing support for elementary and secondary education. In many instances, funds are distributed on a strict per-pupil or per-teacher basis. In other cases, allocations are made with consideration of the fiscal capacity of districts. States provide not only general support for education, but also award categorical funds to support special programs or facilities. There are wide variations in the foundation formulae that States use and the levels of contributions that localities provide to finance education.

The ARRA does not prescribe a particular definition of “State support for elementary and secondary education” for purposes of the Stabilization program MOE requirements, and the Department is not defining this term through regulation. Rather, in recognition of the variations in school finance data and the lack of a statutory definition of “State support for elementary and secondary education,” the Department is providing States with some flexibility in quantifying that support.

Governing Principles

The following principles govern the Stabilization program elementary and secondary education MOE requirements:

1. The data used to determine levels of support must include only *State* support for education. Local government contributions, such as revenues generated through local property taxes, are not considered State support. However, State appropriations to local governments to support elementary and secondary education may be included as State support. Federal funds are not considered part of State support.
2. The data must include the principal funding mechanisms through which a State provides assistance for elementary and secondary education.
3. A State may establish its level of State support solely on the basis of the amount of funds provided through its primary elementary and secondary education funding formula(e), but is not required to do so. The formula(e) must include the State’s base or foundation formula(e).
4. A State may also include categorical and other support that is not provided through the primary funding formula(e).
5. A State may choose to quantify its level of State support 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).

6. The level of State support may be actual amounts or projected amounts that are based on the best available data.
7. The sources of data that a State uses to make the determinations must be consistent from year to year. For example, a State may not exclude a particular funding formula in one year and include it in the next. A State may make necessary adjustments, however, to account for changes in the procedures through which it provides support for education during the applicable years.
8. A State may demonstrate that it is maintaining its level of State support for elementary and secondary education on either an aggregate basis or a per-student basis. It is not necessary for a State to maintain its level of support under each individual formula or program.
9. The “floor” or comparison level for Stabilization program MOE determinations is always the level of State support in FY 2006.
10. The State must maintain adequate documentation that substantiates the levels of State support that it has used in making MOE calculations.

State Support for Public Institutions of Higher Education

As noted above, the ARRA requires States to maintain their levels of State support for both elementary and secondary education and for public IHEs. State support for public IHEs is provided mainly through State appropriations and these amounts are included in a State’s MOE determinations. On the other hand, the ARRA expressly excludes, from the MOE calculations, support for capital projects and research and development and tuition and fees paid by students.

Although the ARRA excludes certain data from the State support determinations, it does not prescribe a particular definition of “State support for public institutions of 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 uniform definition of State support, the Department is providing States with some flexibility in quantifying that support.

Governing Principles

The following principles govern the Stabilization program MOE requirements relative to public IHEs:

1. The data used to determine levels of support must include only *State* support for public higher education. The data may not include any State support for private IHEs. In some States, local governments may provide support for community colleges or other public IHEs. Local government contributions are not considered State support. In addition, Federal funds are not considered part of State support.
2. The data must include the principal funding mechanisms through which a State provides assistance to public IHEs. For example, the data would include State appropriations for public higher education.
3. The data must exclude support for capital projects (such as construction or modernization activities) and research and development, and tuition and fees paid by students.
4. The data may not include support from private donors, such as charitable contributions that individuals make to public IHEs.
5. The data may not include corporate contributions for public IHEs, such as payments that a corporation makes for stadium-naming rights.
6. A State may quantify its level of State support for public higher education by providing data in addition to that provided on the appropriations enacted by the State legislature for public 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 public higher education and interest or earnings received from State-endowments pledged to public IHEs.
7. State funding for financial assistance paid to students attending public IHEs is not considered State support for these institutions. Rather, such funding is considered support for students to enable them to pay educational expenses, even if the IHEs administer the funding. However, unrestricted State funding for public IHEs may be considered 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.
8. If a State provides unrestricted State funding to public 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.

9. A State may choose to quantify its level of State support on the basis of data that it provides for other purposes, such as data on State revenues to support public higher education that the State provides to the State Higher Education Executive Officers (SHEEO) as part of that organization's annual State Higher Education Finance (SHEF) study. Alternatively, a State could use institutional finance data submitted by IHEs under NCES' Integrated Postsecondary Education Data System (IPEDS) survey.
10. The level of State support may be actual amounts or projected amounts that are based on the best available data.
11. The sources of data that a State uses to make the determinations must be consistent from year to year. For example, a State may not include certain data sources one year and exclude those sources in the next. A State may make necessary adjustments, however, to account for changes in the procedures through which it provides support for education during the applicable years.
12. A State may demonstrate that it is maintaining its level of State support for public IHEs on either an aggregate basis or on a fulltime-equivalent (FTE) enrollment basis. It is not necessary for a State to maintain its level of State support for individual categories of activities.
13. The "floor" or comparison level for Stabilization program MOE determinations is always the level of State support in FY 2006.
14. The State must maintain adequate documentation that substantiates the levels of State support that it has used in making MOE calculations.

The Maintenance-of-Effort Waiver Process

Under section 14005(d)(1) of the ARRA, a State must meet the Stabilization program's elementary and secondary education MOE requirement for each of FYs 2009, 2010, and 2011, as well as the public IHE MOE requirement for each of these years, unless the Secretary waives a requirement. Section 14012 of the ARRA permits the Secretary to grant an MOE waiver if the Secretary determines that the State has provided for elementary, secondary, and public higher education, for the fiscal year under consideration, a percentage of the total revenues available to the State that is equal to or greater than the percentage provided for that purpose in the preceding fiscal year. This waiver criterion applies to waivers of both the elementary and secondary education and the public IHE MOE requirements.

Stabilization Program MOE Determinations and Applying the Waiver Criterion

In determining whether it meets the applicable MOE requirements and the criterion for an MOE waiver, a State should consider the following:

- **FY 2009 MOE requirements**

Elementary and Secondary Education:

Is the level of State support for elementary and secondary education for FY 2009 at least as great as the level of State support for elementary and secondary education for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2009.

Public IHEs:

Is the level of State support for public IHEs for FY 2009 at least as great as the level of State support for public IHEs for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2009.

MOE Waiver Criterion for FY 2009
The percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2009 is at least as great as the percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2008.

- **FY 2010 MOE requirements**

Elementary and Secondary Education:

Is the level of State support for elementary and secondary education for FY 2010 at least as great as the level of State support for elementary and secondary education for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2010.

Public IHEs:

Is the level of State support for public IHEs for FY 2010 at least as great as the level of State support for public IHEs for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2010.

MOE Waiver Criterion for FY 2010
The percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2010 is at least as great as the percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2009.

- **FY 2011 MOE requirements**

Elementary and Secondary Education:

Is the level of State support for elementary and secondary education for FY 2011 at least as great as the level of State support for elementary and secondary education for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2011.

Public IHEs:

Is the level of State support for public IHEs for FY 2011 at least as great as the level of State support for public IHEs for FY 2006?

- If yes, the MOE requirement is met and no waiver of this particular requirement is needed.
- If no, the MOE requirement is not met and the State must demonstrate that it meets the MOE waiver criterion for FY 2011.

MOE Waiver Criterion for FY 2011
The percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2011 is at least as great as the percentage of the total State revenues used to support elementary, secondary, and public higher education for FY 2010.

The following illustration, which was included in the April 2009 program guidance, is provided here for the State's convenience:

Applying the MOE Waiver Criterion

In determining whether to grant a waiver of the Stabilization program MOE requirements, the Department will carefully examine State data demonstrating the following:

A-1: \$ _____. The aggregate level of State support for elementary, secondary, and public higher education for the fiscal year for which a waiver is sought (i.e., FYs 2009, 2010, or 2011).

A-2: \$ _____. The total revenues available to the State (for education and other purposes) for the fiscal year for which a waiver is sought (i.e., FYs 2009, 2010, or 2011).

B-1: \$ _____. The aggregate level of State support for elementary, secondary, and public higher education for the fiscal year immediately preceding the fiscal year for which a waiver is sought.

B-2: \$ _____. The total revenues available to the State (for education and other purposes) for the fiscal year immediately preceding the fiscal year for which a waiver is sought.

In order to be eligible for an MOE waiver for a given fiscal year, a State must demonstrate that the percentage of its total State revenues that were used to support elementary, secondary, and public higher education for that fiscal year was equal to or greater than the percentage of its total State revenues that were used to support elementary, secondary, and public higher education for the preceding fiscal year.

Relative to the data referenced above, to be eligible for a waiver, the State would have to demonstrate that the percentage obtained by dividing the amount on Line A-1 by the amount on Line A-2 is at least equal to or greater than the percentage obtained by dividing the amount on Line B-1 by the amount on Line B-2.

“Total revenues available to the State”

For purposes of the MOE waiver criterion, the terms “total State revenues” or “total revenues available to the State” may include either of the following:

1. Projected or actual total State *revenues* for education and other purposes for the relevant years. These data would include both general and special revenues from sources such as personal income taxes; corporate income taxes; sales and use taxes; alcohol, tobacco and motor fuel taxes; licenses and fees; and other specific levies. The data may also include revenues from lottery sales and tobacco settlements.

Projected or actual total State *appropriations* for education and other purposes for those years. These data would include the State’s annual operating budget as funded through the various State appropriations acts.

When a State May Seek an MOE Waiver

A State may apply for an MOE waiver as soon as it has available, for both the fiscal year for which the waiver is sought and the preceding fiscal year, actual or projected data on:

1. The levels of State support for elementary, secondary, and public higher education; and
2. The total revenues available to the State.

What a State Must Include in its MOE Waiver Request

For the State’s convenience, the Department has attached to this guidance a sample waiver application form that includes the information that a State must include in its request for a waiver. States may, but are not required to, use this particular form.

Any State seeking a Stabilization program MOE waiver must submit to the Department:

1. Data that specifically address the MOE waiver criterion for the applicable years; and
2. An assurance of the Governor or his/her authorized representative that the State has available for inspection documentation that demonstrates that these data are accurate, valid, and reliable.

Waiver Submission Procedure

A State may submit a Stabilization program MOE waiver request by e-mailing an electronic version of the request in .PDF (Portable Document) format to Stabilizationfundapplication@ed.gov.

Waiver Decision

The Department intends to notify a State of its decision concerning an MOE waiver request within two weeks of receipt of that request.

**Request for a Waiver of the Maintenance-of-Effort (MOE)
Requirements Governing the State Fiscal Stabilization Fund Program**

The State of _____ requests a waiver of the following Stabilization program MOE requirements (check applicable lines):

_____ The FY 2009 elementary and secondary education MOE requirement.

_____ The FY 2009 public IHE MOE requirement.

_____ The FY 2010 elementary and secondary education MOE requirement.

_____ The FY 2010 public IHE MOE requirement.

_____ The FY 2011 elementary and secondary education MOE requirement.

_____ The FY 2011 public IHE MOE requirement.

In support of this request, the State provides the following data:

1. For waivers of a FY 2009 MOE requirement:

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2009.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2009.

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2008.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2008.

2. For waivers of a FY 2010 MOE requirement:

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2010.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2010.

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2009.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2009.

3. For waivers of a FY 2011 MOE requirement:

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2011.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2011.

\$ _____ The aggregate level of State support for elementary, secondary, and public higher education for FY 2010.

\$ _____ The total revenues available to the State (for education and other purposes) for FY 2010.

I assure that the State of _____ has available for inspection documentation that demonstrates that these data are accurate, valid, and reliable.

Governor or Authorized Representative of the Governor (Printed Name):	
Signature:	Date: