



## **Analysis of Maintenance of Effort (MOE) Provision in the Coronavirus Aid, Relief, and Economic Security (CARES) Act**

### **Background**

Maintenance of Effort (MOE) provisions are often used by Congress to try to ensure federal funds supplement rather than supplant state investment. Typically, governors are not supportive of such requirements as they would prefer the federal government leave complete discretion to states on state budgetary matters. Given expectations that state budgets will be under immense financial strain and we know that has disproportionate impact to public higher education, APLU supports a strong MOE provision in emergency supplemental legislation in response to COVID-19. This could help ensure federal investment has the intended impact as well as try to prevent state cuts to public higher education like that which occurred during the last recession. Language that includes state financial aid programs could ensure that support for institutions does not come at the expense of state aid to students.

The House Democrats' [bill](#), the Take Responsibility for Families and Workers Act, (page 116) includes a similar MOE provision. One key difference is that the bill would not extend waiver authority to the Secretary of Education.

### **Maintenance of Effort Language in the CARES Act**

*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*

### **Plain Language Summary of MOE Provision Relative to Higher Ed**

The MOE provision in the CARES Act essentially says that a state that receives K-12 funding (Section 18003) or funding from the pot of money for governors to give to either K-12 or higher education at their discretion (Section 18002) must provide an assurance to the U.S. Secretary of Education that it will not cut its FY20 or FY21 investment in higher education to institutions (public and private) and need-based financial aid below the state's average of the prior 3 fiscal years. The Secretary of Education has authority to waive the requirement to "relieve fiscal burden on States."

## **Holes in the MOE**

While in concept an MOE can be very helpful in protecting state investment in higher education, the one included in the CARES Act does so minimally.

### *Waiver Authority to Secretary DeVos:*

The entire MOE requirement can be waived by Secretary DeVos. It is not difficult to imagine governors requesting waivers and Secretary DeVos responding favorably or the Secretary providing a blanket waiver of the requirement to all states.

### *Impacts of Using 3-Year Average as Baseline:*

As the [data demonstrate](#), many states over the last several years have gradually and significantly increased state investment in higher education. By using a 3-year average, the CARES Act leaves significant room for states to cut investment in higher education and still be in compliance with the MOE provision. It would be advantageous for higher education to use either FY20 as a baseline or a 2-year average. 48 states invested more in FY20 than their 3-year average. Alaska and Kentucky are the exceptions. **APLU advocates using “Fiscal Year 2020 or the average of the three prior fiscal years, whichever is higher” as the baseline.**

### *Exclusion of Capital Projects/R&D/Tuition & Fees:*

Programs/Line Items that are explicitly excluded from coverage within the MOE are more vulnerable to cuts.

### *Need-Based Aid*

Only state need-based financial aid is included within the MOE thus leaving aid that is not based on need vulnerable to cuts.