COLLEGE ACCESS CHALLENGE GRANT (CACG) PROGRAM MAINTENANCE OF EFFORT (MOE) REQUIREMENTS and WAIVER REQUESTS

(January 2013)

The Office of Postsecondary Education issues this guidance to provide States with information about maintenance of effort requirements and waiver requests under the College Access Challenge Grant program. This guidance represents the Department's current thinking on these topics. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations. If you are interested in commenting on this guidance, please e-mail us your comment at CACGP@ed.gov or write to us at the following address: 1990 K Street, N.W., Washington, DC 20006.

A. GENERAL[1]

1. What are the maintenance of effort (MOE) requirements associated with the College Access Challenge Grant (CACG) Program?

Section 137 of the Higher Education Act of 1965, as amended (HEA), requires that States provide financial support for higher education at least at a level equal to the average amount provided over the five preceding State Fiscal Years (SFYs) for public institutions of higher education (public institutions), excluding capital expenses and research and development costs, and for financial aid for students attending private institutions of higher education (private institutions). This MOE provision is one of several similar provisions in programs administered by the U.S. Department of Education (the Department). These provisions create incentives for States to maintain a commitment to funding education by tying maintenance of State financial support to eligibility for Federal education funds. In the case of the HEA MOE provision in particular, the intent is to discourage States from decreasing funding for higher education and passing additional costs onto students seeking postsecondary degrees and certificates, and to reward States that make higher education funding a priority.

2. What are the consequences for failing to maintain financial support for higher education?

Section 137 of the HEA states that if a State fails to maintain financial support for higher education and does not receive a waiver of the MOE requirements, the Secretary must withhold all funds that would be available to the State through the CACG Program. The statute permits the Secretary to award CACG funds to a State that has failed to maintain financial support for higher education and has not received a waiver of the requirements *after* it has made significant efforts to correct the violation. (See section D in this document for more information.)

[1] This guidance addresses only the MOE requirement and the related waiver request process. For information about the CACG Program, visit www.ed.gov/programs/cacg.

3. What happens if a State maintains support for public institutions but not for private institutions, or vice versa?

In order to receive its CACG award, a State must maintain financial support for both public *and* private institutions. A State that fails to maintain financial support for either public or private institutions, or both, will not receive its CACG award, absent receiving a waiver of the MOE requirements or making a significant effort to correct the violation.

B. CALCULATING STATE MAINTENANCE OF EFFORT UNDER THE HEA

1. How does a State document that it has met the MOE requirements?

States are required to provide the Department with information on State appropriations and support for higher education in Part 1 of the Annual Performance Report (APR) for the CACG program, which is due each year by May 15. The data submitted in the APR must be certified as accurate by the State's Budget Officer. The APR is available on the CACG Web site: http://www2.ed.gov/programs/cacg/performance.html.

Each State that receives CACG funds or intends to apply for CACG funds for the upcoming fiscal year is required to complete its APR and provide data on State support for public and private institutions, regardless of whether it believes it has met the MOE requirements. This information must be reported for the relevant SFY and the five preceding fiscal years. For example, for the Federal fiscal year (FFY) 2012 APR, which States must submit by May 15, 2013, the relevant year is SFY 2012. The State's 2012 APR must include information on the support provided for higher education in SFYs 2007 through 2012. The Department will assess the State's MOE by comparing its support for higher education in SFY 2012 to the average support provided in SFYs 2007-2011. Please note that APRs will include data that a State has previously submitted in prior years' APRs in order to calculate the five-year average. Levels of support reported by States should be consistent with information provided in prior years' APRs. If a State submits information for a particular year that is different from what the State reported for that year in previous APRs, it must explain why the data differ.

2. When the APR refers to "fiscal year 2012," what period of time is being considered?

The Department refers to fiscal years by the calendar year in which the budget period ends. Therefore, "fiscal year 2012" refers to the fiscal year that spans 2011-2012. Maintenance of effort data submitted by States should be consistent with this approach (e.g., data reported for SFY 2012 should reflect the 2011-2012 fiscal year).

3. When calculating State support for public institutions, does a State need to include funds made available for scholarships and financial aid?

Yes. In calculating State support for public institutions, section 137 of the HEA only excludes funds made available for capital expenditures and research and development. Therefore, the calculation of State financial support must include all funds the State made available for financial aid for students attending public institutions.

4. **What information must a State report about private institutions?**

Section 137 requires a State to provide information about the State appropriations for student financial aid at private non-profit institutions.

5. **When calculating State support for higher education, should States include support for tribal colleges?**

Yes. Any State support for institutions of higher education,[2] including support for tribal colleges, should be included.

6. **Should the State include financial aid made available to students attending proprietary (for-profit) institutions?**

No. Section 137 of the HEA specifically refers to assistance provided to "institutions of higher education" (IHEs), which is defined in section 101(a) of the HEA as public or other non-profit institutions. Accordingly, States are only required to maintain support for and report on financial aid made available to students attending private non-profit institutions. If a State appropriates student financial aid for private institutions but does not preclude students from using their State financial aid at proprietary institutions, the State does not have to, but may, exclude funding awarded to students attending proprietary institutions. However, reporting must be consistent across all SFYs.

7. **How does a State calculate financial aid for public versus private institutions when funding follows the student? In other words, what should a State do if it offers scholarships or grant programs that students may use to attend either public or private schools? In such cases, the State does not control the level of student aid provided to public versus private institutions.**

If a State does not have an appropriation for student financial aid designated specifically for use at private institutions, the State should report actual student financial aid expenditures at these institutions. For example, if a State made $25 million in total financial aid available in a particular SFY and $10 million was used by students at private institutions, the State should identify its State financial support as $10 million for financial aid for students attending private non-profit institutions and $15 million for students attending public institutions. However, if, in future years, that $25 million is used differently than in past years through student choice (e.g., $20 million used by students to attend private non-profit institutions and $5 million used by students to attend public institutions) in a way that prevents the State from meeting its MOE obligation for private institutions, the Department will consider the aggregate level of financial aid *made available* to students to attend private non-profit institutions in determining whether a State is deserving of a waiver of the MOE requirement for private non-profit institutions. That

[2] For purposes of the CACG Program, an institution of higher education is an educational institution as defined in section 101 of the HEA.

is, the Department will not penalize States that fail to meet the MOE requirement for private non-profit institutions as a result of student choice. States that appropriate financial aid funds without regard to the type of institutions its students attend, but that can demonstrate they made as much or more overall financial aid *available* to the students in their States, as compared to the five-year average, will be treated favorably in the waiver process. Therefore, if a State appropriates dollars for financial aid in a manner that allows students to use that aid without regard to the type of institution they attend, the State should indicate in its APR the total amount of funds made available for financial aid and disaggregate the levels of support for students attending public versus private non-profit institutions.

8. If a State makes financial aid available to students attending schools in other States, should those funds be included in the State's calculations?

No. Section 137(a) of the HEA specifically indicates that the calculation of a State's financial support is restricted to assistance provided to IHEs within the State.

9. If a State provided financial aid to students through a program that ended prior to the SFY that is under review (but during the five-year period considered for the purposes of calculating MOE), should those funds be counted?

Yes. The Department considers all State funds that were provided to support higher education in the SFY that is currently being assessed for MOE and the five preceding SFYs, regardless of whether the program still exists.

10. For States with biennial budgets, how should State support be calculated?

A State with a biennial budget may report its data by the biennium if it believes that doing so will more accurately demonstrate the level of State support for higher education. In that instance, a State should report data on the biennium including the year for which State effort is being assessed and the three preceding biennia. For example, if the relevant year for the APR is 2011, a State should report on the 2009-2011 biennium in addition to the 2003-2005, 2005-2007, and 2007-2009 biennia.

11. If a State reports data on a biennial basis one year, can the State report on an annual basis in a subsequent year?

Generally, a State should not alternate between annual and biennial budget years to calculate its level of financial support for higher education. However, if a State believes that changing its reporting would be more accurate, it should submit data in both forms to the Department along with an explanation for why the State wishes to change its calculation method.

C. STATE FISCAL STABILIZATION FUNDS

1. Can a State include State Fiscal Stabilization Funds (SFSF) in its calculation of State financial support?

For purposes of calculating State financial support for higher education, the Department will allow States to count SFSF funds that were used for higher education in their calculations for public institutions.[3] However, the State must indicate in its APR that it included such funds in its calculation, state the amount of those funds so counted, and certify that those funds were not used for capital expenses or research and development costs. The State must also indicate that those funds have not been previously counted as State support for higher education. The State cannot use or count SFSF-Education funds for support to private institutions but may count SFSF-Government Services funds that were used to support financial aid for students attending private institutions.

If a State elects to use SFSF funds in its calculation of State financial support for public institutions, that level of funding must be used in future years in determining the average amount of financial support for the preceding five SFYs.

2. Does a State have to include support for higher education that was provided out of SFSF funds in its calculation of State financial support for public institutions?

No. A State may decide whether or not to include all, some, or none of the support it provided for higher education out of SFSF funds as State support for purposes of meeting the HEA MOE requirements. However, if a State elects to count SFSF funds to meet its MOE requirements in a certain year, those SFSF funds must be included in all future MOE calculations that include that year.

3. Can SFSF funds be used to meet MOE for private institutions?

SFSF-Education funds can only be used to support public education, and therefore cannot be used to support financial aid to students attending private institutions. However, there is no such restriction on SFSF-Government Services funds, which may be used to support financial aid for students attending private institutions. The State may therefore include SFSF-Government Services funds that are used to support financial aid for students attending private non-profit institutions in its MOE calculation for private non-profit institutions.

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[3] The SFSF Program has two components: the Education Stabilization Fund and the Government Services Fund. States must use Education Stabilization Funds to restore State support for elementary and secondary education, public higher education, and, as applicable, early childhood education programs and services. States must use the Government Services Fund for public safety and other government services, which may include assistance for elementary and secondary education and public IHEs, and for modernization, renovation, or repair of public school facilities and IHE facilities.

4. **If a State uses SFSF funds to meet MOE, should those funds be reported in the APR?**

Yes. States should indicate in the APR the amount of SFSF funds included in the total appropriation. A State only needs to count the minimum amount of SFSF funds required to meet MOE (since counting excess funds will increase the five-year average used to determine whether a State has met MOE in future years). For example, if a State appropriated $400 million in State funds and $150 million in SFSF funds to support public institutions, but only needed $500 million to meet MOE, the State could report $500 million in support ($400 million State and $100 million SFSF) in its APR. The State would not be required to report the full $550 million in its APR.

5. **Where does a State indicate in the APR whether SFSF funds are included?**

The APR does not specifically request this information. Therefore, States should add a note in the MOE section of the APR indicating the amount of SFSF funds included in the total appropriation.

6. **If a State can report less SFSF funds in its APR than were actually made available, can it also report less State funding than was actually made available in a given fiscal year?**

No. The Department only allows this flexibility in the reporting of SFSF funds in accordance with the American Recovery and Reinvestment Act (ARRA). All State funds made available for higher education must be reported in the APR. For example, if a State's required level of effort in a given year is $375 million and the State appropriated $400 million in State funds and $150 million in SFSF, the State's APR should include all $400 million in State funds made available. The State does not have to report the additional SFSF funds.

7. **Can a State count other Federal funds in its support for higher education?**

No. Apart from SFSF funds, only State dollars can be counted for the purposes of measuring higher education support.[4]

D. REQUESTING A WAIVER OF THE MOE REQUIREMENTS

1. **May a State receive a waiver of the MOE requirements?**

Yes. The Secretary of Education may waive the MOE requirements in section 137 of the HEA if it is determined that such a waiver would be equitable due to exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in a State's financial resources.

[4] States that receive funds under the SFSF program were explicitly granted this flexibility under the ARRA.

2. How does a State request a waiver?

If a State fails to maintain financial support for public and/or private institutions, it may request that the Secretary waive the requirements under section 137 of the HEA. In its request for a waiver, the State must 1) complete the total revenues, appropriations, and expenditures chart in the MOE section of the APR and 2) send a letter outlining the exceptional or uncontrollable circumstances that prevented the State from maintaining its support for higher education. The letter should be e-mailed to CACGP@ed.gov, and a hard copy should be sent to the address below.

Assistant Secretary for Postsecondary Education
U.S. Department of Education
1990 K Street, N.W.
Washington, DC 20006
Attention: CACG MOE Waiver Request

3. By when must a State submit a waiver request for a given year?

Waiver requests must be e-mailed and postmarked on or before May 15 of the year under consideration. *States are encouraged to submit waiver requests as early as possible to facilitate the Department's consideration of those requests and to minimize delays in the CACG award process.*

4. Who should be involved in submitting a waiver request?

The Department requires that data submitted by the State in support of its waiver request be certified by the State Budget Officer. Additionally, because the Department will need to understand the State's budget and related fiscal data, we strongly encourage the State Budget Officer or a representative from the State Budget Office to be involved in requesting a waiver and available to answer questions from the Department during its review of the request.

5. What information does a State need to submit when it requests a waiver?

As stated above, the State must submit a letter requesting a waiver and providing a rationale for the waiver. The State must also submit, at a minimum, the following information for the year in which the State failed to maintain effort and the preceding five SFYs: total State revenues, total State appropriations, total State support for public institutions, and total financial aid made available for students attending private institutions. This information must be submitted in addition to the information required by the APR. The State is welcome to submit any additional information it would like the Department to consider when making its determination.

6. **If a State has segregated funds or fees with very narrow funding sources and allowable uses (e.g., a conservation fund or highway fund), does the State need to include revenue from these sources in its waiver request?**

When reporting total State revenues to the Department, a State should include only those sources of revenue that were available to appropriate for higher education. The Department will consider all sources of funds that have been used or are available to the State to provide support for higher education in the SFYs under consideration. Therefore, if the State used a particular source of revenue to provide support to higher education in one year, the Department will consider it an available source of funding.

7. **What information regarding a State's rainy day fund should a State include in its waiver request?**

A State with a rainy day fund should indicate the total amount of funds in such an account as well as the amount of funds transferred into and out of the account in the SFYs under consideration. In addition, the State should identify, if applicable, any legal requirements governing these transfers, including the allowable uses of these funds. The Department will evaluate this information on a case-by-case basis to determine whether and how such circumstances may be relevant to a State's failure to meet the MOE requirements.

8. **How will the Department determine if a waiver is warranted?**

The Department evaluates each State's waiver request independently using a two-tiered approach:

1. **Exceptional or Uncontrollable Circumstance:**
    a. **Precipitous and Unforseen Decline in Financial Resources:** The Department first examines State revenue data to determine if the State did, in fact, experience an exceptional or uncontrollable circumstance, such as a precipitous and unforeseen decline in financial resources. The Department makes this determination by looking at the extent to which State revenues for the SFY in question changed compared to the average of the prior five SFYs.

    b. **Natural Disaster:** A State seeking an MOE waiver on the basis of the occurrence of a natural disaster should submit, at a minimum, the following pieces of information: a declaration of a disaster by the Federal Emergency Management Agency or the corresponding State agency; a description of the effect of the disaster on the State budget; a summary of the financial costs to the State and the sources of funding used to respond; and, if applicable, a detailed explanation of why the natural disaster necessitated disproportionate reductions in support for higher education.

2. **Equitability:** If the Department determines that the State faced an exceptional or uncontrollable circumstance, the Department then considers whether it would be equitable to grant a waiver. In order to determine whether a waiver would be equitable, the Department examines overall State appropriations and support for public and private institutions, comparing the level of support provided for each in the current MOE year to the average amount provided over the previous five SFYs. It then examines whether the reductions in support for public and private institutions were less than or equal to the percentage reduction in overall appropriations. In general, if the percentage reductions for public and private institutions are less than or equal to the percentage reduction in overall appropriations compared to the prior five-year average, the reduction in State support for higher education would be determined to be equitable.

In evaluating a State's waiver request, the Department may consider other fiscal information that is publicly available, as well as information previously submitted to the Department by the State for this or other Federal program purposes, and may request further information from the State, as needed.

9. If a State requests a waiver of the MOE requirements under the HEA, as well as a waiver of the MOE requirements under another statute (e.g., the Individuals with Disabilities Education Act (IDEA)), how will this affect the Department's review?

If a State requests an MOE waiver under more than one of the Department's programs, the Department will review the requests to ensure that the State-reported data that should be the same across programs (e.g., State revenues in a given year) are, in fact, reported consistently across the programs. If a State plans to request an MOE waiver under more than one of the Department's programs, we recommend that, before the requests are submitted to the Department, you work with your State Budget Office, as well as those responsible for other waiver requests, to verify that reported data are consistent. Submission of data that are inconsistent across programs will delay the Department's review of all MOE waiver requests.

10. How soon after a State submits a waiver request will the Department notify the State whether the request has been granted?

The Department will notify a State whether its waiver request has been granted no later than September 30 of the fiscal year in which it submitted the request. As in previous years, waiver decision letters will be made available on the CACG Web site following notification to States.

11. If a State's request is denied, is there a reconsideration process? What is the timeline for a reconsideration?

If a State's waiver request is denied, the Department will give the State an opportunity to provide additional information that was not included in the original waiver request and that may affect the Department's determination as to whether granting a waiver would be equitable due to exceptional or uncontrollable circumstances. However, unless the State provides new data or information that was not included in the original waiver request, the Department will not reconsider its determination. The Department will provide a timeline for the reconsideration process when the State is notified of its decision regarding the original waiver request.

12. Will the Department automatically grant a waiver if a State demonstrates a decline in financial resources?

No. If the State experienced a precipitous and unforeseen decline in financial resources that hindered its ability to meet its funding obligations to higher education, the Department will examine State fiscal data provided in the waiver request. If the Department determines that State reductions in funding were not applied equitably, the State's waiver request will be denied.

13. If a State has a surplus in the year in which it is applying for a waiver, does that mean it will not receive a waiver?

When a State submits budgetary data indicating that, in the year in which it failed to meet MOE for higher education, its revenues exceeded its total appropriations by a substantial amount relative to the size of the State's overall budget, the Department will consider this fact as part of its determination of whether the State faced an exceptional and uncontrollable circumstance. Generally, the Department views a large surplus as an indication that the State did have the requisite financial resources to maintain support for higher education and will deny the waiver request. However, the Department does not take a rigid, formulaic approach in its evaluation of surpluses. If the State has additional information that it believes the Department should consider in reviewing the State's waiver request, the State should provide that information to the Department. Such information might include, for example, information on the uses of the surplus (e.g., to pay down existing State debt) or constitutional requirements (e.g., rolling over a percentage of total revenues each year).

14. If a State's waiver request is denied, can the State still receive its CACG grant for the year in question?

Yes. Section 137 of the HEA requires that the Secretary withhold any CACG funds from a State that failed to maintain effort or receive a waiver *until* that State makes a significant effort to correct the violation. States that make such effort may receive their CACG awards.

15. When a State's waiver request is denied and the State seeks to correct the violation, what must the State include in its letter of assurance from the Governor?

When a State fails to meet MOE under section 137 of the HEA and is denied a waiver, the State may still receive its CACG funds if it makes a significant effort to correct the violation by restoring funding for higher education. If the State cannot immediately restore funding for higher education, it may submit a letter of assurance from the Governor indicating the State's intent to make a significant effort to meet the MOE requirements by restoring funding for higher education. The letter must provide this assurance and be signed by the Governor, but it does not need to describe the specific manner in which funds will be restored.

16. What does a State need to do to demonstrate that it has made "a significant effort?"

If the Department rejects a State's waiver request, we will respond to the State with a letter explaining our rationale and indicating the amount of funds the State would have to restore to demonstrate "a significant effort." In general, the amount of funding needed to demonstrate a significant effort would represent the amount of additional funding for public and/or private institutions that would bring the reductions in support for such institutions in line with the reductions to the State's overall appropriations.

For example, if a State reduced support for public institutions by 10 percent, yielding an MOE shortfall of $10 million while reducing overall appropriations by five percent, the Department might require the State to provide an additional $5 million, which would reduce the cut to public institutions to five percent—the level that is proportional to the reductions to overall appropriations—thereby satisfying the Department's criterion for "significant effort."

17. What if a State has to restore funds and the Federal fiscal year is about to end?

The Department will ensure that the end of the Federal fiscal year (FFY) on September 30 does not affect a State's ability to receive CACG funds. The Department may obligate all funds to States that are still in the process of restoring funding at the end of the FFY and then place a hold on those funds for a specified period of time to provide the State with an opportunity to resolve outstanding MOE issues. In general, the Department will only obligate and hold funds at the close of the FFY if it has received an assurance from the State that it intends to make a significant effort to correct the MOE violation.

18. To whom should questions regarding MOE requirements and/or waivers be directed?

Questions regarding MOE requirements under the HEA and/or waiver requests should be directed to CACGP@ed.gov.