

## **Summary of the Implementation of the Federal “Maintenance of Equity” Provision**

Austin Reid, Federal Affairs Advisor, the National Conference of State Legislatures

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### **Introduction**

Thank you for the invitation to testify before the committee today. My name is Austin Reid and I am a Federal Affairs Advisor at the National Conference of State Legislatures (NCSL). NCSL is a nonpartisan organization working in a bipartisan manner to serve and strengthen the legislatures in all the state and territories.

In this role, I serve as both NCSL’s lead analyst of federal education policy and serve as its primary representative on education matters before Congress and the administration, including, primarily, the U.S. Department of Education.

I am testifying today to provide a “Summary of the Implementation of the Federal ‘Maintenance of Equity’ Provision” that was included in the American Rescue Plan Act of 2021 (ARPA).

I have been monitoring this provision closely for the entirety of its existence. I had conversations with the congressional staffers who wrote the provision during the bill drafting process and have been in regular communication with the U.S. Department of Education about its implementation since the spring of 2021.

My testimony today reflects my understanding of the complete timeline of the conception and implementation of this provision. I hope that a thorough summary provides the legislature with the background and information it needs to inform any action it wishes to take.

NCSL does not recommend policy to the legislatures on issues that are internal to the states, including this issue.

However, NCSL does lobby the Congress, the White House and federal agencies for the benefit of state legislatures in accord with the policy directives and resolutions recommended by the Standing Committees and adopted at the NCSL Annual Business Meeting. All policy directives and resolutions must be approved by three-quarters of states present at the business meetings.

As part of my duties in representing NCSL before the federal government, I staff the NCSL Standing Committee on Education, a body of legislators and legislative staff that are selected by their legislature’s leadership to develop positions on state-federal issues to guide NCSL’s lobbying efforts.

The NCSL Standing Committee on Education has adopted policy pertaining to the Maintenance of Equity provision, urging the federal government to provide states with full waivers and maximum flexibility. NCSL believes that state education finance decisions are solely a matter of the states, owing to the plenary power they have in education.

NCSL's position should in no way be construed to direct how the Alaska legislature should respond to the matter at hand.

Much of the information I will provide in today's testimony has been gleaned by direct conversations I have had with key federal stakeholders in the process of representing NCSL's interests.

For my testimony, I will first offer a full timeline of the implementation of the Maintenance of Equity provision and conclude my testimony with a summary of critical observations that are worth consideration by legislatures when seeking to understand this provision.

### **Background on the Drafting of the Maintenance of Equity Provision**

In February 2021, I was made aware of a proposed provision known as "Maintenance of Equity" that was being drafted by congressional committee staff in the Senate Health, Education, Labor and Pensions Committee's majority office.

I participated in conversations with the staff who wrote the provisions and will relay what I believe are the intentions that undergird the policy.

Historically, Congress includes a Maintenance of Effort provision as a fiscal condition states must agree to in order to receive stimulus funds for education. This typically requires states to maintain aggregate levels of education funding.

In early 2021, there was a common view that states were expected to experience precipitous revenue declines and would likely have to cut funds to education.

Congress incorporated this view into its Maintenance of Effort provision for the second tranche of stimulus funds for education through the Elementary and Secondary Education Relief Fund (ESSER), as passed through the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 (CRRSAA).

This Maintenance of Effort provision allowed states to cut funding to education, so long as they only reduced funds in proportion to the overall reduction in the state budget. This same Maintenance of Effort provision was included again in the eventual ARPA.

However, congressional staff and others with input on the drafting process, feared repeating a dynamic that occurred during the Great Recession when 29 states made across-the-board budget cuts to education in the face of revenue declines.

While this action may have been fair in the context of funding between various agencies, enacting an across-the-board funding cut to K-12 education has a disproportionate impact on school districts that are more reliant on state funding due to having a lower property tax base and thus less ability to raise local funds to support their schools.

In other words, these districts see a greater share of their budget cut without the ability to compensate through increased local fund contributions. These districts typically, but not always, serve relatively higher populations of low-income students compared to other districts.

To prevent this dynamic, while also allowing states to make overall funding cuts without needing to seek a Maintenance of Effort waiver, congressional staff wanted to create a backstop to provide additional protections to education funding in districts that serve relatively larger populations of low-income students.

This was, I believe, the primary motivation behind the drafting of a new, first-of-its-kind “Maintenance of Equity” provision.

### **The Maintenance of Equity provision, as included in the American Rescue Plan Act**

The American Rescue Plan Act (ARPA) was enacted on March 9, 2021, and included an additional \$122 billion in funding for education in states through the ESSER fund.

While there were some doubts as to whether a “Maintenance of Equity” provision would ultimately make it into the final bill, it was indeed included.

The Maintenance of Equity provision includes four prongs, two for states and two for local school districts.

According to the statute, states could not:

- “Reduce State funding (as calculated on a per-pupil basis) for any high-need local educational agency in the State by an amount that exceeds the overall per-pupil reduction in State funds, if any, across all local educational agencies in such State in such fiscal year.”
- “Reduce State funding (as calculated on a per-pupil basis) for any highest poverty local educational agency below the level of funding (as calculated on a per-pupil basis) provided to each such local educational agency in fiscal year 2019.”

And school districts could not:

- “Reduce per-pupil funding (from combined State and local funding) for any high-poverty school served by such local educational agency by an amount that exceeds the total reduction in local educational agency funding for all schools served...”
- “Reduce per-pupil, full-time equivalent staff in any high-poverty school by an amount that exceeds the total reduction in full-time equivalent staff in all schools served...”

### **Maintenance of Equity Guidance Released**

While guidance for the ARPA Maintenance of Effort provision was released in April 2021, the initial guidance for the Maintenance of Equity was not released until June 9, 2021.

I believe the guidance interpreted the statute in two key ways that have had considerable implications for the implementation of Maintenance of Equity over the past three years.

First, the guidance asserted that states must calculate compliance with the state Maintenance of Equity provision even if they did not enact a statewide spending cut to education.

This was a major update. To my eyes, and some others, a plain language reading of the law supported the interpretation that Maintenance of Equity only applied in instances where state education budgets were cut.

This interpretation also seemed to align with what I believed to be the Congressional intent behind the proposal—that in the event that a state must cut education funding, it must spare districts with higher populations of low-income students from the disproportionate impact of those cuts.

Even the Department's own guidance acknowledges this intent: "Accordingly, if State or local funds are cut, the maintenance of equity provisions ensure that LEAs and schools serving a large share of students from low-income backgrounds do not experience a disproportionate share of such cuts."

One immediate implication of this interpretation, that Maintenance of Equity applied in the absence of overall spending cuts to education, was that it became very difficult, if not impossible, for legislatures to know during the budget process whether they would ultimately be in compliance with the Maintenance of Equity provision and take appropriate action to ensure compliance.

Compliance would ultimately become a retrospective assessment that could only be made after a state funded its education budget, distributed funds to districts via its state education funding formula and then compared the state's data with the federal Maintenance of Equity compliance calculations. These federal compliance calculations could not be administered until after states passed their budgets and sent requested initial funding data to the Department.

The fact this guidance was issued in mid-June, towards the end of the FY 2022 budget process, did not make matters of compliance any easier from the state legislative perspective, especially for those states who had already concluded their legislative session.

In this sense, the conditions of compliance were not all clearly known to legislatures when they agreed to accept these federal funds and then make timely fiscal decisions for FY 2022.

Second, the guidance clarified that the Department did not believe it had the ability to offer waivers from the state and local Maintenance of Equity provisions, as it did it for the Maintenance of Effort provision.

However, the U.S. Department of Education would later issue updated guidance in December 2021 which effectively waived the two prongs of the local Maintenance of Equity provision for all school districts in the country.

The ARPA statute did grant exemptions under the local Maintenance of Equity provisions for districts in certain circumstances, including those experiencing "an exceptional or uncontrollable circumstance, such as unpredictable changes in student enrollment or a precipitous decline in the financial resources of the LEA, as determined by the Secretary."

In the updated December 2021 guidance, the Department reasoned that all districts faced "fluctuating school enrollments and uncertain revenue collection as a result of the pandemic" and thus could qualify under the exemption.

So long as a district certified it did not and would not “implement an aggregate reduction in combined State and local per-pupil funding” for FY22 and FY23, the Department agreed to waive the local Maintenance of Equity provision for school districts.

I will note that this very broad flexibility was not applied to the state Maintenance of Equity provisions.

The lack of a waiver process would have considerable implications as it did not allow states with exceptional circumstances to receive appropriate exemptions and instead set up a prolonged and often confusing compliance process that lacked transparency.

### **State Compliance Challenges with Maintenance of Equity**

The U.S. Department of Education continued to update the Maintenance of Equity guidance through 2021 and into 2022. Updates were made in August, October and December of 2021.

Over this time, NCSL became aware of at least three states that identified early signs of discrepancies between their state funding formula determinations and the Maintenance of Equity compliance calculations.

Despite these cases, concerns that states would face widespread difficulties with Maintenance of Equity seemed to wane.

This view was seemingly supported by the stronger-than-expected fiscal position of states. Despite fears of revenue declines, the NASBO Fall 2021 Survey indicated that 45 states were on pace to maintain or increase funding for K-12 education in FY 2022, including 41 states that indicated funding increases.<sup>1</sup>

Final expenditure data from NASBO showed 41 states had enacted funding increases for K-12 education, with a median increase of 4.6%.<sup>2</sup>

However, on July 5, 2022, days after the close of FY 2022, the U.S. Department of Education sent a form letter to 39 states explaining that the Department had identified instances of noncompliance with the Maintenance of Equity provision. Ultimately, I believe 41 to 42 states received this initial letter.

The same form letter was sent to each state and was not made public. The Department, when asked during a follow up conversation, would not identify the states that had received this letter.

The letter also did not provide any information about the scope of the compliance issues in each state. The letter merely said “The initial FY 2022 data you submitted indicates that your State is not maintaining equity in one or more high-need or highest-poverty LEAs.”

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<sup>1</sup> [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO\\_Fall\\_2021\\_Fiscal\\_Survey\\_of\\_States\\_S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO_Fall_2021_Fiscal_Survey_of_States_S.pdf)

<sup>2</sup> [https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2023\\_State\\_Expenditure\\_Report-S.pdf](https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/SER%20Archive/2023_State_Expenditure_Report-S.pdf)

These letters were based on initial data submitted by states during the summer and fall of 2021 rather than the final FY 2022 data that was tentatively due days before on June 30, 2022.

Given the encouraging data about widespread state-by-state funding increases for education, I recall there being quite a bit of surprise and confusion among the small group of us who have followed this provision closely from its inception.

As you can imagine, there was quite a bit of confusion in states, especially when there was no indication in the letter of the scope and scale of the compliance issues that had been identified.

NCSL, along with representatives from groups representing state education agencies and governors' offices, sought more details from the Department in a private meeting in early August 2022.

We learned that the Department was sharing details about compliance issues with state agency staff. It was unclear how those details were being shared and at what level of agency staff those details were being shared with.

Anecdotally, I understand details were often shared through phone calls with state agency staff who could vary from mid-level to more senior staff.

The Department would not share any specific state details with us. The Department did provide a high-level summary of compliance issues. They said there were some states with only a handful of districts with compliance issues, while other states had districts with cumulative funding gaps in the hundreds of millions of dollars.

Given the implications that compliance issues with these provisions have for state legislatures, I asked the Department to include key legislative stakeholders in compliance conversations. While I don't believe this request was granted often, if at all, the Department did include me on periodic update calls and later passed along finalized compliance correspondence.

While I was not made privy to any specific compliance conversations, I have gleaned over time a sense of the issues that were causing states to be out of compliance.

As you recall, there are two state prongs to the Maintenance of Equity provision.

One requires that the "highest-poverty" local education agencies (LEAs) receive funding above the Fiscal Year 2019 level.

According to federal guidance, these districts are defined as those serving the highest proportion of low-income students and collectively account for 20% of the state's student population.

From my understanding, states have had fewer compliance challenges with this provision given the widespread increases for education funding.

The other prong requires that low-income districts, or "high-need" LEAs, do not receive less funding year-over-year, on a per pupil basis, compared to more high-income districts.

According to federal guidance, these districts are defined as those serving the highest proportion of low-income students and collectively account for 50% of the state's student population.

This provision is most likely responsible for compliance issues, which frequently occur even when states have increased overall per pupil spending on education.

Even when state funding increases, the manner in which the funding is distributed can result in schools receiving less funding than they had received in the prior year.

As I will detail, many of the school finance strategies that are responsible for variable year-over-year funding are most often meant to target resources to certain student populations that require more resources to support their education or to find the appropriate balance between the state share of funding and a local school community's fiscal capacity.

While there are many and varied definitions of equity, these strategies are commonly understood in the education finance world to be tools of equity in school funding.

As you will see, the various and complex strategies that states use to distribute funding for education does not neatly align with the federal Maintenance of Equity test, which is fairly simple and based on a single and static variable- a student's income status.

There are at least three key state education finance strategies that may cause non-compliance with Maintenance of Equity.

It's worth noting that many states have incorporated these education finance strategies in response to court settlements that directed the state to more effectively fund and equitably finance education in the state.

These strategies can individually cause compliance issues with Maintenance of Equity calculations, but the interaction among these mechanisms may cause even more complicated compliance issues.

### 1. States with foundation funding formulas

Thirty-seven states use foundation funding formulas. The simple concept behind this education finance strategy is to target education funding based on student characteristics to ensure student populations that may need extra education support receive more resources. This is the prevailing trend in state education finance to provide more equitable education funding. While every student gets a base amount, states provide additional funding "weights" for certain student populations. These can vary by state, but common populations for targeted funding are low-income students, students with disabilities and English learners. Funding is then distributed to districts based on student enrollment and attendance patterns.

Many states with foundation funding formulas likely experienced compliance issues with Maintenance of Equity. This is likely due to enrollment pattern changes across districts. As you know, enrollment and attendance fluctuated substantially in school districts across the country

during School Years 2021-2022 and 2022-2023, especially among vulnerable populations of students, which usually receive additional weighted funding.

A school district that sees enrollment declines in populations that received additional funding weights could see an overall per pupil funding decline even if the state provided a base per pupil increase through the funding formula.

## 2. States with education finance “equalization” mechanisms

Most states deploy school finance “equalization” strategies that work to balance the share of state resources and local tax capacity for funding education. Typically, property-rich districts are expected to contribute a greater share of locally-derived funding than property-poor districts.

States can tweak this funding balance from year to year. For instance, if a state determines that a district now has greater local tax capacity to fund education, it may offset a reduction in state funding by allowing for or requiring an increase in local funding. This then frees up state dollars to increase the state share of funding in other more property-poor districts.

It is possible that some states had districts deemed noncompliant with the Maintenance of Equity due to the effect of these equalization mechanisms.

## 3. States with “hold harmless” provisions

States that have districts with rapidly declining enrollment will sometimes enact “hold harmless” provisions on top of a weighted student funding formula in order to stabilize a district’s finances and provide a fiscal “soft landing” as the district makes plans to downsize. This is common for districts in rural areas where communities are reliant on one school district. Over time, the state will slowly phase out this hold harmless provision, which results in reductions in state aid, even though those reductions are less drastic than would have occurred if an enrollment-based formula completely drove the levels of state funding.

NCSL is aware of at least one state which had districts that were initially deemed noncompliant due to the presence of these hold harmless provisions.

As I alluded to before, the interaction of these strategies could result in noncompliance and make matters of demonstrating compliance very complicated. NCSL is aware of one state that was in the middle of carrying out a seven-year funding equalization plan, coupled with a revised weighted student funding formula, that was disrupted by the prospect of noncompliance with the Maintenance of Equity provision. In that plan, the state had identified districts that were relatively overfunded and districts that were relatively underfunded. Over the course of the seven-year plan, the state was slowly transferring additional money to the underfunded districts by reducing state funding in the overfunded districts, while allowing those districts to enact local tax levies above a statutory cap to replace the loss of state funding.

In contrast to the wide array of state education finance strategies, it’s worth noting the Maintenance of Equity test is based on a single variable- a student’s income status.

While this is an important factor to consider, and a variable that is accounted for in many foundation funding formulas, there are many other important measures that states take into account when distributing education funding, including student factors such as instructional needs related to disability or English learner status, or the local tax capacity to fund education.

While some districts may have experienced reductions in funding, it was often not the result of state spending cuts, but rather a passive reduction in funding after the application of state funding formulas, which are often calibrated to direct resources towards the students who benefit the most from equity efforts.

Indeed, in private conversations, the Department indicated to me that we have not seen states deliberately cut funding to low-income schools.

### **Resolving State Compliance Challenges with Maintenance of Equity**

Over the last year and a half, the U.S. Department of Education has been working with state education agencies to resolve widespread compliance issues for fiscal year 2022 and I believe proactively address issues in fiscal year 2023.

As I mentioned earlier, the Department conducted “technical assistance” calls with state agency staff or engaged in formal, but often private correspondence to work towards resolution.

As I understand the compliance process, state agency staff would attempt to demonstrate compliance by recalculating state data in ways that would better match the requirements of the Maintenance of Equity compliance tests.

In cases where new data runs did not sufficiently resolve discrepancies between the state funding formula and the federal calculations, the Department would invite states to submit “small Local Education Agency tolerance” proposals.

These proposals were invited in cases where enrollment changes in small districts could have significant impact on per-pupil state funding. According to federal guidance, a state agency, “may propose to the Department a written plan for a reasonable level of tolerance when calculating whether it has maintained equity for these LEAs.”

The Department began sending out batches of compliance notification letters during the fall of 2022. While the letters did not directly affirm compliance, they typically recognized a state’s “ongoing commitment to the maintenance of effort requirements.”

Many letters did not include any background details as to how compliance was ultimately determined, although a few state letters contained specific details, typically if a state had submitted a “small Local Education Agency tolerance proposal.”

As I mentioned before, the lack of formal waiver process made it difficult for state representatives, such as myself, to understand the true scope of state issues and assess how consistently the Department was applying the same rationale across states when signaling compliance.

From the initial count of 41 to 42 states with compliance issues, the Department later revealed that at least six states were found compliant once the Department calculated its final FY22 data instead of the initial FY22 data it relied on when first communicating noncompliance to states.

By late November 2022, I understand that a total of 13 states had demonstrated sufficient compliance with the provision.

Over the course of the next year, from late 2022 into fall 2023, the Department communicated batches of final compliance letters to states on a month-to-month basis, usually at a pace between two to four states a month.

By the end October 2023, the Department communicated to me that nine states had still not demonstrated sufficient compliance.

By the end of 2023, four states remained, including Alaska. Each of these states were considered by the Department to have exhausted attempts to come into compliance through their previously offered tolerance proposals.

The Department sent letters requesting these states make supplemental appropriations as remedy for the funding discrepancies identified by the Maintenance of Equity provision.

As I understand, by this point, at least five other states had agreed to make supplemental appropriations after being unable to resolve outstanding compliance issues.

Some states made supplemental appropriations through legislative action. Others were able to use funds through the federal Coronavirus Relief Fund (CRF) or State and Local Fiscal Relief Fund (SLFRF) after the Department issued guidance in January 2023 that permitted this.

To date, I am aware of at least seven states that have made supplemental appropriations to demonstrate compliance for FY 2022, with payments ranging from several hundred thousands of dollars up to nearly \$100 million. The total across these seven states is at least \$267 million based on the numbers I have been provided by the Department.

However, there is no record of these supplemental appropriations in the final compliance letters that have since been published on the Department's Maintenance of Equity portal.

In the December 2023 letter, Alaska was asked by the Department to make supplemental appropriations of nearly \$8 million to three districts for FY 2022 in order to comply with Maintenance of Equity.

However, that number changed when the Department sent its most recent letter in March. The letter now asks for over \$22 million for two districts for FY 2022. One of these districts was identified in the previous letter, another was newly identified, and two other districts included in the previous letter were dropped entirely.

The total request for additional state appropriations for FY 2022 and FY 2023 totals nearly \$30 million.

## **Conclusion**

To my knowledge, the Maintenance of Equity provision is the first time the federal government has been given a direct interest in state education finance decisions.

The decision by the U.S. Department of Education to apply this provision in the absence of overall state funding cuts, without providing an opportunity for states to seek waivers, has led to considerable complications for states, and given the federal government unprecedented influence over state education finance decisions. Given the states' plenary authority in education, this is an unusual and, in some ways, extraordinary federal authority.

To sum up, the Department's interpretation of the Maintenance of Equity provision, as communicated in guidance and understood through its compliance processes, has been consequential in three key ways:

1. States were unable to make proactive decisions to demonstrate compliance with the provision. Compliance could only be assessed after state education budgets were allocated through state education finance formulas and compared to federal calculations.
2. States experienced widespread compliance issues that were not the result of enacting spending cuts to education, but rather were based in technical discrepancies between state education finance formulas and the Maintenance of Equity provision. The Maintenance of Equity does not account for the variety of strategies that states use to target funding to critical student populations.
3. States had limited or opaque pathways to seek full relief from the provision. While many states were able to demonstrate compliance over multiple attempts, the compliance process often lacked transparency and required considerable effort by both state education agency staff and staff at the U.S. Department of Education. To comply, some states have been asked to make significant supplemental appropriations that circumvented their state education finance formula, even when they had already increased overall spending on education.

I thank you for the opportunity to testify before this committee and look forward to answering any questions you may have.