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4000-01-U

DEPARTMENT OF EDUCATION

34 CFR Chapter II

Proposed Requirement--American Rescue Plan Act Elementary and Secondary School Emergency Relief Fund

[Docket ID ED-2021-OESE-0116]

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Proposed requirement.

SUMMARY: The Department of Education (Department) proposes a requirement for the American Rescue Plan Elementary and Secondary School Emergency Relief (ARP ESSER) Fund, under the American Rescue Plan Act of 2021 (ARP Act). This requirement is intended to promote accountability and transparency and ensure that each State educational agency (SEA) and each local educational agency (LEA) meets the statutory requirement to maintain equity.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Submit your comments through the Federal eRulemaking Portal or via postal mail, commercial delivery, or hand delivery. We will not accept comments submitted by fax or by email or those submitted after the comment period. To ensure that we do not receive duplicate copies, please submit your comments only once. In addition, please include the Docket ID at the top of your comments.

- Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using Regulations.gov, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "FAQ."

- Postal Mail, Commercial Delivery, or Hand Delivery: If you mail or deliver your comments about the proposed requirement, address them to U.S. Department of Education, 400 Maryland Avenue, SW, Room 3W113, Washington, DC 20202. Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Britt Jung, U.S.
Department of Education, 400 Maryland Avenue, SW, Room
3W113, Washington, DC 20202. Telephone: (202) 453-
5563. Email: ESSERF@ed.gov.

If you use a telecommunications device for the deaf
(TDD) or a text telephone (TTY), call the Federal Relay
Service (FRS), toll-free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments
regarding the proposed requirement. To ensure that your
comments have maximum effect in developing the requirement,
we urge you to clearly identify the specific section of the
proposed requirement that each comment addresses.

We invite you to assist us in complying with the
specific requirements of Executive Orders 12866 and 13563
and their overall requirement of reducing regulatory burden
that might result from the proposed requirement. In
addition to your general comments and recommended
clarifications, we seek input on (i) what demographic
information (e.g., poverty status, race/ethnicity, students
with disabilities, and English learners) LEAs should
publicly post on the schools the LEA identifies as high-
poverty schools as noted in proposed requirement (a)(2) and

(ii) on any further ways we could reduce potential costs or increase potential benefits while preserving the effective and efficient administration of our programs.

During and after the comment period, you may inspect all public comments about the proposed requirement by accessing Regulations.gov. Due to the novel coronavirus 2019 (COVID-19) pandemic, the Department buildings are currently not open to the public. However, upon reopening you may also inspect the comments in person in room 3C124, 400 Maryland Avenue, SW, Washington, DC, between the hours of 8:30 a.m. and 4:00 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

At the same time the Department is publishing this Notice of Proposed Requirement, it is publishing a Request For Information (RFI) to help inform its support for SEAs and LEAs in implementing the MOEquity provisions. Through the RFI, the Department is seeking input from the public with respect to specific questions as well as additional information and perspectives on MOEquity implementation. Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record: On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the

comments or other documents in the public rulemaking record for the proposed requirement. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under FOR FURTHER INFORMATION CONTACT.

Purpose of Program: The ARP ESSER Fund provides a total of nearly \$122 billion to SEAs and LEAs to help them safely reopen and sustain the safe operation of schools and address the impacts of the COVID-19 pandemic on the Nation's students by addressing students' academic, social, emotional, and mental health needs. As a condition of receiving the funds, each SEA and LEA must comply with multiple requirements, including the maintenance of equity (MOEquity) requirements in section 2004 of the ARP Act.

Program Authority: ARP Act of 2021, Public Law 117-2, March 11, 2021.

PROPOSED REQUIREMENT: This document contains one proposed requirement.

Background:

The ARP Act provides a total of nearly \$122 billion via the ARP ESSER Fund to SEAs and LEAs to help schools return safely to in-person instruction; sustain the safe operation of schools; and address the academic, social,

emotional, and mental health impacts of the COVID-19 pandemic on the Nation's students. Section 2004 of the ARP Act includes new MOEquity provisions that are a condition for an SEA and LEA to receive funds under the ARP ESSER Fund. Under section 2004(b) of the ARP Act, the MOEquity provisions ensure that LEAs and schools serving a large share of students from low-income backgrounds do not experience a disproportionate share of reduced funding in fiscal years (FYs) 2022 and 2023, and that, for the highest-poverty LEAs, State funding is not decreased below their FY 2019 level. In addition, the MOEquity provisions ensure that each LEA safeguards its high-poverty schools from disproportionate cuts to funding and staffing. On August 6, 2021, the Department issued a Dear Colleague Letter (DCL) to Chief State School Officers and District School Superintendents emphasizing the importance of maintaining equity and addressing specific implementation challenges for fiscal year 2022. On August 6, the Department also issued updated Frequently Asked Questions on the Maintenance of Equity Requirements (MOEquity FAQs)¹ providing detailed guidance on how each SEA and LEA can

¹ See https://oese.ed.gov/files/2021/08/Maintenance-of-Equity-updated-FAQs_final_08.06.2021.pdf .

maintain equity and comply with the MOEquity provisions. In that guidance, the Department indicated that SEAs and LEAs should consider making MOEquity data publicly available.

In Appendix A to the MOEquity frequently asked questions issued in June 2021 and updated on August 6, 2021, the Department asked each SEA to report to it baseline and initial data on the State's high-need and highest-poverty LEAs, the statewide per-pupil amount of State funds provided to all LEAs in FYs 2021 and 2022 as well as the per-pupil amount provided to each high-need LEA in those years, the per-pupil amount of State funds provided to each highest-poverty LEA in FYs 2019 and 2022, and a list of the highest-poverty LEAs for which the State must maintain equity. The Department is posting these data on its website at <https://oese.ed.gov/offices/american-rescue-plan/american-rescue-plan-elementary-and-secondary-school-emergency-relief/maintenance-of-equity/> and will update the data as new data become available. These data are available to interested stakeholders and the public. The Department also intends to collect SEA-level MOEquity data through each State's annual performance report and will make those data publicly available.

Although data on State-level MOEquity will be available on the Department's website, there are not publicly available data for LEA-level MOEquity. Accordingly, in the proposed requirement, the Department addresses this need to emphasize the importance of transparency and accountability in ways that are consistent with the Department's policy goals of ensuring that schools and LEAs serving large proportions of historically underserved groups of students--including students from low-income families, students of color, English learners, students with disabilities, migratory students, and students experiencing homelessness--receive an equitable share of State and local funds as the Nation continues to recover from the impact of the COVID-19 pandemic on our education system. To support these goals, and to ensure public accountability for the implementation of the MOEquity provisions of the ARP Act, the Department proposes to require that each SEA make publicly available information on how each LEA in the State is maintaining fiscal and staffing equity. Requiring that MOEquity data be publicly available will allow parents, families, and local communities to access information on how the LEA is maintaining equity for schools with high concentrations of

students from low-income families. Additionally, public posting of data and information on how each LEA in the State is maintaining equity is an important accountability tool for SEAs and the Department.

Several questions in the MOEquity FAQs on LEA-level maintenance of equity (see generally Questions 22-32) address the data an SEA would report under this proposed requirement. For example, Question 32 discusses LEAs that may be excepted under paragraph (a)(1) below from meeting the MOEquity requirements, including those LEAs that qualify as having exceptional or uncontrollable circumstances in FY 2022 due to the pandemic. (See also the August 6, 2021, DCL.) Similarly, Questions 23-25 clarify how to identify high-poverty schools under paragraph (a)(2)(i). Question 26 provides information applicable to paragraphs (a)(2)(ii) and (iii) on how the amount of per-pupil funding aligns with reporting on per-pupil expenditures under section 1111(h)(1)(C)(x) of the Elementary and Secondary Education Act of 1965. Questions 28 and 29 clarify how to determine full-time-equivalent (FTE) staff applicable to paragraphs (a)(2)(iv) and (v). Finally, Questions 27 and 30 address how to determine if an

LEA has maintained equity in its high-poverty schools for paragraph (a) (2) (vi) .

Proposed Requirement:

(a) By December 31 of each applicable school year, an SEA must publish the following MOEquity data on its website, in a way that is machine-readable and accessible, for each LEA in the State, listed by the applicable National Center for Education Statistics LEA and school ID, in a location accessible for parents and families:

(1) Whether the LEA is exempt from MOEquity requirements under section 2004(c) (2) of the ARP Act, including but not limited to an LEA that demonstrates an exceptional or uncontrollable circumstance.

(2) If an LEA is not exempt from MOEquity requirements as detailed in paragraph (a) (1)-- (i) Which schools in the LEA are identified as high-poverty schools as defined in section 2004(d) (4) of the ARP Act and demographic information for each such school compared to the entire LEA. (ii) The per-pupil amount of funding for each high-poverty school in the LEA in FYs 2021, 2022, and 2023, as applicable for the year in which the data are published.

(iii) The per-pupil amount of funding in the aggregate for all schools in the LEA in FYs 2021, 2022, and 2023, as applicable for the year in which the data are published.

(iv) The per-pupil number of FTE staff for each high-poverty school in the LEA in FYs 2021, 2022, and 2023, as applicable for the year in which the data are published, which may also be indicated as the number of students per FTE staff.

(v) The per-pupil number of FTE staff in the aggregate for all schools in the LEA in FYs 2021, 2022, and 2023, as applicable for the year in which the data are published, which may also be indicated as the number of students per FTEs. (vi) Whether the LEA did not maintain equity for any high-poverty school in FY 2022 or 2023, as applicable for the year in which the data are published.

(b) If an LEA maintains equity by grade span, the SEA must post the LEA's data described in paragraphs (a)(2)(i)-(vi) by grade span.

(c) When reporting on each data element in paragraph (a), the SEA must ensure that the data reported are accurate and consistent with the requirements in section 2004(c) of the ARP.

Executive Orders 12866 and 13563

Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may--

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the

principles stated in the Executive Order.

This proposed regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

We have also reviewed this proposed regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency--

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account--among other things and to the extent practicable--the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives--such as user fees or marketable permits--to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency "to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include "identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes."

We are issuing the proposed requirement only on a reasoned determination that its benefits would justify its costs. In choosing among alternative regulatory approaches, we selected the approach that would maximize net benefits. Based on an analysis of anticipated costs and benefits, we believe that the proposed requirement is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with the Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities.

Potential Costs and Benefits

The Department has analyzed the costs and benefits of complying with the proposed requirement. Due to the varying capacity and administrative structures of affected entities, we cannot estimate, with absolute precision, the likely effects of the proposed requirement. However, as discussed below, we estimate that the proposed requirement would have a net cost of . \$60,000 over two years.

For the purposes of these estimates, the Department assumes that, as part of their routine compliance efforts and effective administration of the affected Federal grants, States already collect and retain the relevant

MOEquity data on each LEA's implementation of the MOEquity requirements and that such data are stored in a single repository (e.g., a single data file including information for all of the State's LEAs). We further assume that States regularly collect and retain demographic data on schools within the State. To the extent that these assumptions are incorrect, actual costs borne by States could be higher than those outlined below.

We assume that a representative from each of the 50 States, the District of Columbia, and Puerto Rico (hereafter referred to as States) would review the final requirement. We assume that such review would take, on average, one hour per State for a one-time cost of approximately \$2,800.²

We assume that, for each State, a management analyst would need to spend approximately eight hours, on average, compiling the relevant data and preparing it for posting. Within this estimate, we assume a management analyst would compile and incorporate demographic data into the same file as the MOEquity data, employ any necessary data suppression

² The Department assumes a loaded wage rate of \$53.79 per hour based on the average hourly wage rate for management analysts employed in State governments, excluding schools and hospitals (https://www.bls.gov/oes/current/naics4_999200.htm), which is multiplied by 1.61 to account for the employer cost for employee compensation (<https://www.bls.gov/news.release/pdf/ecec.pdf>).

rules, and make any necessary formatting changes for posting of the data. We assume that posting the data online would take a network administrator (\$59.09³ per hour) approximately 30 minutes. In total, we assume posting data would cost approximately \$32,300 per year.

Finally, we assume that approximately 20 States would need to update their data after initial posting. We assume the updates would take a management analyst approximately 4 hours to complete and would require 30 minutes for a network administrator to post. In total, we assume posting corrections would cost approximately \$6,500 per year.

As noted above, approximately 20 States would need to post their data twice. As such, we estimate that the proposed requirement would cost a total of approximately \$60,000 over two years.

In general, we believe that the costs outlined above could be offset with funds the States have reserved under the ARP ESSER grant program. The benefit of publicly posting this local MOEQuity data is to facilitate public accountability so that parents and families will be able to

³ The Department assumes a loaded wage rate of \$59.09 per hour based on the average hourly wage rate for network and computer systems administrators employed in State governments, excluding schools and hospitals (https://www.bls.gov/oes/current/naics4_999200.htm), which is multiplied by two to account for overhead and benefits.

access publicly available information on how each LEA in the State is maintaining fiscal and staffing equity. As such, we believe the benefit to the general public would far outweigh any burden on States.

Clarity of the Regulations

Executive Order 12866 and the Presidential memorandum "Plain Language in Government Writing" require each agency to write regulations that are easy to understand.

The Secretary invites comments on how to make the proposed requirement easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain technical terms or other wording that interferes with their clarity?
- Would the proposed regulations be difficult to understand for or to explain to someone with literacy challenges or limited English proficiency?
- Does the format of the proposed regulations (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?
- Would the proposed regulations be easier to understand if we divided them into more (but shorter)

sections?

- Could the description of the proposed regulations in the SUPPLEMENTARY INFORMATION section of this preamble be more helpful in making the proposed regulations easier to understand? If so, how?

- What else could we do to make the proposed regulations easier to understand?

To send any comments that concern how the Department could make the proposed requirement easier to understand, see the instructions in the ADDRESSES section.

Intergovernmental Review: These programs are subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for these programs.

Regulatory Flexibility Act Certification

The Secretary certifies that this proposed regulatory action would not have a significant economic impact on a substantial number of small entities. The U.S. Small

Business Administration Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

The proposed regulatory action would affect only States, none of which is a small entity for the purpose of this analysis.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.). This helps ensure that the public understands the Department's collection instructions, respondents provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly

understood, and the Department can properly assess the impact of collection requirements on respondents.

The proposed requirement that an SEA must publish on its website MOEquity data for each LEA in the State contains an information collection requirement. Under the PRA, the Department has submitted this requirement to OMB for its review.

A Federal agency may not conduct or sponsor a collection of information unless OMB approves the collection under the PRA and the corresponding information collection instrument displays a currently valid OMB control number. Notwithstanding any other provision of the law, no person is required to comply with, or is subject to penalty for failure to comply with, a collection of information if the collection instrument does not display a currently valid OMB control number.

As discussed in the Potential Costs and Benefits section of the Regulatory Impact Analysis, this proposed requirement would create cost and burden hours for SEAs. In the following paragraphs, we estimate the cost and burden hours associated with complying with this proposed requirement. Differences between the estimates in the Regulatory Impact Analysis and this section are due to

differences in calculating the net impact and annual impact of this requirement.

We assume that, for each SEA, including the District of Columbia and the Commonwealth of Puerto Rico, a management analyst, at an hourly rate of \$53.79, will spend approximately 8 hours compiling the relevant data and preparing it for publication on the SEA website. At an hourly rate of \$59.09, we estimate that posting the data online would take a network administrator approximately 30 minutes. We estimate that posting the MOEquity data would cost each SEA \$460 and result in 8.5 burden hours annually for a total annual cost of \$23,900, and 442 burden hours.

We estimate that approximately 20 States will need to update their data after initial posting. We assume the updates would take a management analyst approximately 4 hours to complete and would require 30 minutes for a network administrator to post. We estimate posting corrections will cost each SEA \$240 and result in 4.5 burden hours for a total cost of \$4,900, and 90 burden hours.

Collectively, we estimate that this proposed requirement would result in a total estimated cost of \$23,800 and a total estimated burden of 532 hours to the

public annually.

The Department is requesting paperwork clearance on the OMB 1810-0759 data collection associated with this proposed requirement. That request will account for all burden hours and costs discussed within this section. Consistent with 5 CFR 1320.8(d), the Department is soliciting comments on the information collection through this document. We must receive your comments on the collection activities contained in this proposed requirement on or before [INSERT DATE 60 DAYS FROM THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments related to the information collection activities must be submitted electronically through the Federal eRulemaking Portal at www.regulations.gov by selecting the Docket ID number ED-2021-OESE-0116 or via postal mail, commercial delivery, or hand delivery by referencing the Docket ID number and the title of the information collection request at the top of your comment. Comments submitted by postal mail or delivery should be addressed to the PRA Coordinator of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave., SW, Room 6W208D, Washington, DC 20202-8240.

Note: The Office of Information and Regulatory Affairs and

the Department review all comments related to the information collection activities posted at www.regulations.gov.

Collection of Information

Information Collection Activity	Estimated Number Responses	Hours Per Response	Total Estimated Burden Hours	Estimated Total Cost
MOEquity Data Posting	52	8.5	442	\$32,300
MOEquity Data Updates	20	4.5	90	\$6,500
Annualized Total	72		532	\$38,800

Accessible Format: On request to the program contact person listed under FOR FURTHER INFORMATION CONTACT, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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as well as all other documents of the Department published in the *Federal Register*, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the *Federal Register* by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated:

Ian Rosenblum,
*Deputy Assistant Secretary for Policy
and Programs Delegated the authority to
perform the functions and duties of the
Assistant Secretary for Elementary and
Secondary Education.*