

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Juliet Sebold and Monica Colbert

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** April 2, 2019

**SUBJECT:** Proposed initiative measure 2019-2020 #68, concerning expanded learning opportunities and a tax on nicotine products

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To create the "Colorado Expanded Learning Opportunities Program", (program) to be administered by a newly created Expanded Learning Opportunities Agency (agency) within the Colorado Department of Education.

2. To create the board of directors for the agency.
3. To create or contract with a Colorado nonprofit organization to administer the program, and to create a volunteer board of directors for the administering nonprofit organization.
4. To provide money to eligible students in individual learning accounts controlled by eligible students' parents pursuant to rules created by the agency.
5. To allow eligible students to use the financial aid for out-of-school learning experiences that take place outside of normal school hours for programs, materials, activities, and other pursuits or purchases which may include, in part, tutoring, supplemental academic instruction in core subject areas, targeted support for special needs and learning disabilities and outdoor activities that teach youth new skills.
6. To create and develop criteria for the selection of allowable uses for the financial aid and for certifying providers of out-of-school learning experiences.
7. To allow a credit against any state income tax imposed on monetary and in-kind contributions to a nonprofit organization selected to administer the "Colorado Expanded Learning Opportunities Program".
8. To implement a cap on the total amount of income tax credits allowed in any state fiscal year for contributions to a nonprofit organization selected to administer the "Colorado Expanded Learning Opportunities Program" and to specify the circumstances under which the cap may increase in any state fiscal year until a maximum cap is reached.
9. To require the General Assembly to reduce the total amount of other income tax credits allowed to taxpayers by an amount at least equal to the credits claimed and allowed by the measure.
10. To authorize a tax on the sale of nicotine products, the revenue from which is credited to the Expanded Learning Opportunities Agency for administrative and operational costs of the agency.
11. To allow the state to retain and spend any revenue collected from the tax on the sale of nicotine products, together with earnings on such revenue, and to exempt such revenue from the provisions of section 20 of article X of the state constitution.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. Pursuant to section 22-86.1-101 (4), the program covers children and youth between the ages of three and nineteen. It may be clearer to reference a child or youth who is "at least three years of age but who has not attained nineteen years of age".
4. In section 22-86.1-101 (6), the experience means any "material" or "system" that provides supplemental educational or developmental support. Would this include computer software, camping equipment, or woodworking supplies? What is an example of a "system"?
5. With respect to section 22-86.1-102 (2)(b), what does it mean to develop criteria for the "provision and selection" of "allowable uses for funds". Does this mean that the agency is to determine the allowable uses of funds? Or how eligible activities are provided?
6. Section 22-86.1-102 (2)(b) of the proposed initiative requires the financial aid distributed pursuant to the program to be spent on "new services" and not supplant existing funding for programs available to eligible students. Does this mean that financial aid under the program cannot be spent on existing services, such as tutoring or supplemental academic instruction services that already exist, but for which sufficient funding has not previously been available?
7. How is "local education provider" defined for purposes of section 22-86.1-102 (2)(d)?
8. Will the criteria created and developed pursuant to section 22-86.1-102 be promulgated as agency rules pursuant to the provisions of the "State Administrative Procedure Act" in part 1 of article 4 of title 24, C.R.S.? Are you specifically giving the agency rulemaking authority under that act? If so, you should include language granting specific statutory authority under the act.
9. What is the maximum family income for which financial aid will be awarded under the program on a sliding scale?

10. What does it mean in section 22-86.1-102 (2)(f) that financial aid will be utilized "in accordance with the relevant provisions of the Constitution of the United States and the Colorado Constitution"?
11. Section 24-1-107.5, C.R.S., requires state agencies to have specific authority to establish a nonprofit entity to carry out a governmental function. Is that your intent in section 22-86.1-102 (2)(h) to give the agency statutory authority, if needed?
12. The "Colorado Revised Nonprofit Corporation Act" is contained in articles 121 to 137 of title 7, C.R.S. For clarity, the proponents might wish to include that citation in section 22-86.1-102 (2)(j)(I).
13. Section 22-86.1-102 (2)(j)(IV) states that the administering nonprofit shall be governed by a volunteer board of directors.
  - a. Who determines the structure and membership of the board?
  - b. Is a volunteer board required only if the administering nonprofit is created by the agency? If the administering nonprofit is an existing nonprofit corporation, as provided in section 22-86.1-102 (2)(h), does the structure or membership of the nonprofit corporation's board need to change?
14. Does section 22-86.1-102 (2)(j)(VII) provide for financial audits of the individual learning accounts? Section 22-86.1-102 (2)(i) does not appear to include audits of individual learning accounts. The language of the proposed initiative does not appear to include the ability to recoup unauthorized expenditures from the individual learning accounts from the parents of eligible students. Is that the proponents' intent?
15. It appears that section 22-86.1-104 repeals the program, effective December 31, 2030.
  - a. Standard drafting practice requires, "This article 86.1 is repealed, effective December 31, 2030."
  - b. By using the word "sunset" in your headnote for this section, are you intending to have a sunset report prepared by the Department of regulatory agencies prior to the article's repeal? If so, you must amend section 24-34-104, C.R.S, to include the sunset review in proper date sequence. For example, you would create a new subsection (33.5) with a repeal date of December 31, 2030.

- c. While the headnote references "reauthorization", the article will not be extended without a bill enacted by the General Assembly before December 31, 2030.
16. In section 39-22-121.5 of the proposed initiative, by "taxable year", do you mean "income tax year"? Please consider specifying "income tax year" or other type of year in the measure wherever you have used the term "taxable year" or "tax year".
  17. To make the proposed initiative easier to follow, please consider defining "taxpayer" in section 39-22-121.5, to mean "individual, estate, trust, and corporation" and then using the term "taxpayer" to replace that list throughout the proposed initiative. Also, please consider creating a defined term for "Fiscal year credit cap" and "Colorado Expanded Learning Opportunities Program pursuant to section 22-86.1-102 (2)(j)".
  18. Is the amount of the credit allowed to an individual, estate, trust, and corporation (taxpayer) each year an amount equal to 100% of the contribution to the nonprofit organization selected to administer the Colorado Expanded Learning Opportunities Program (nonprofit), or some other amount? Please consider specifying the percentage of the contribution that the taxpayer may claim as a credit.
  19. Subsection (2) of section 39-22-121.5 in the proposed initiative states that the total amount of credits allowed in any fiscal year is \$50 million. Assuming the credit is allowed for the income tax year beginning on January 1, 2020, the first income tax year in which the credit may be claimed will fall in the second half of the 2019-20 state fiscal year. Can the entire \$50 million in credits be claimed for contributions made in the second half of the 2019-20 state fiscal year?
  20. Which state entity will make the determination that \$50 million in credits have been claimed?
  21. The proposed initiative states that if the total amount of credits claimed in a state fiscal year equals or exceeds 90% of the fiscal year credit cap, the cap can be increased by \$50 million until the fiscal year credit cap reaches \$300 million dollars. If this is the case, is there really a \$50 million cap in any state fiscal year as stated in the first sentence of subsection (2)? Or, is there an initial cap \$50 million that may be increased by an additional \$50 million in any state fiscal year until the maximum fiscal year credit cap of \$300 million is reached?

22. How will the timing of the provision that increases the cap by \$50 million in a fiscal year operate, as the state fiscal year and the state income tax year do not coincide? At what point during the state fiscal year will the determination be made about whether the total amount of credits claimed pursuant to the proposed initiative is equal to or has exceeded 90% of the fiscal year credit cap?
23. If the state fiscal year cap automatically increases in any state fiscal year in which the amount of the credits claimed in the state fiscal year equal or exceed 90% of the cap, why does the proposed initiative specify that the credits are allowed on a first come- first served basis? Would this provision apply only when the maximum \$300 million fiscal year credit cap is reached?
24. Which state entity will be responsible for determining that the total amount of credits claimed pursuant to the proposed initiative equal or exceed 90% of the then-applicable fiscal year credit cap?
25. How many years do you anticipate it will take for the \$300 million fiscal year credit cap to be achieved?
26. Subsection (4) of section 39-22-121.5 of the proposed initiative directs the General Assembly to reduce the total amount of other income tax credits allowed in any fiscal year by the same amount of the credits "claimed and allowed" pursuant to the measure in the same fiscal year. The amount of credit claimed and the amount of credit allowed pursuant to this measure could be two different amounts. By which amount is the General Assembly required to reduce other credits?
27. If the General Assembly is required to reduce other income tax credits by the amount *claimed* pursuant to the proposed initiative, how will the timing of this requirement operate? For example, income tax credits earned pursuant to the proposed initiative in the 2020 state income tax year will not be claimed by taxpayers until April, 2021, and the department of revenue will not know the total amount of credits claimed pursuant to the proposed initiative for that income tax year until later in 2021. How can the General Assembly reduce other credits allowed for the 2020 income tax year, which would require new legislation during the legislative session beginning in January, 2022, at the earliest, after other taxpayers have already claimed other income tax credits for the 2020 income tax year pursuant to other then-current laws?
28. If the General Assembly is required to reduce other income tax credits by the amount *allowed* pursuant to the proposed initiative, how will the timing of this requirement operate? The first income tax year in which income tax credits

- may be claimed pursuant to the proposed initiative coincides with the start of the 2020 legislative session, which is the first legislative session during which the General Assembly would have an opportunity to reduce other income tax credits. But at the start of the 2020 legislative session, income tax credits that are allowed for the 2020 income tax year will already be law. How can the General Assembly implement this requirement in time to be effective for the 2020 income tax year?
29. By what method does the General Assembly reduce the amount of other credits? By bill? If so, what happens if the Governor vetoes one or more of such bills?
30. If the state has a fiscal year for which it is required to refund excess state revenues under Section 20 of Article X of the state constitution (the Taxpayers Bill of Rights), would eliminating one or more tax credits in that year constitute a tax policy change directly causing a net tax revenue gain that would require voter approval?
31. Regarding the proposed initiative's addition of a new article 28.6 of title 39, the proposed initiative specifies that the definition of "nicotine product" does not include a "tobacco product" as defined in section 39-28.5-101 (5). That definition of tobacco product does not include cigarettes and the proposed initiative does not specifically exempt cigarettes. To clarify, do you intend the definition of "nicotine product" to exclude cigarettes? If so, please consider specifying this in the definition.
32. The definition of "nicotine product" in the proposed initiative seems to contemplate only how nicotine products are currently used. If in the future, another method of ingesting nicotine is developed that does not employ a mechanism to produce vapor, it seems that it would not be covered by the definition. Is it your intent that any new mechanism to ingest nicotine would require voter approval to be covered by the nicotine tax?
33. Section 29-28.6-103, specifies that the nicotine products tax is in addition to the tax imposed pursuant to article 26 of title 39. Article 26 imposes a sales tax and a use tax. Is your intent to create both a sales tax and a use tax on the sale of nicotine products?
34. It appears that the proposed initiative imposes the nicotine tax on both the actual nicotine and the mechanism used to ingest the nicotine. Is that your intent?

35. The proposed initiative would impose a nicotine product sales tax of five cents per milliliter or device. Are nicotine products sold by the milliliter? Is there a common number of milliliters in which nicotine products are sold?
36. Similarly, the term "device" is not defined in the proposed initiative or in article 26 of current law. What do you mean by device? Are nicotine product devices commonly five milliliters or some other amount? Please consider defining the term "device" for purposes of the proposed initiative.
37. The proposed initiative specifies that the tax "is computed in accordance with schedules or forms prescribed by the executive director of the department of revenue..." What does this mean?
38. By specifying that a retailer is not allowed to retain any portion of the tax on the sale of nicotine products to cover their expenses in collecting or remitting the tax, do you mean to create an exemption to section 39-26-105 (1)(c)(II), C.R.S.?
39. The proposed initiative specifies that the state treasurer is required to credit the net revenue collected pursuant to the nicotine products sales tax to the Colorado Expanded Learning Opportunities Agency (agency). What do you mean by net revenue? Are there certain expenses or costs that the department of revenue or other state entity is allowed to retain from the proceeds of the nicotine products sales tax? If so, what costs or amount is the department of revenue or other state entity allowed to retain?
40. Do the proceeds from the nicotine product sales tax imposed pursuant to the measure first go to the general fund before the treasurer is required to credit them to the agency? Is the department or revenue required to report to the treasurer the amount of revenue received from the tax imposed by the measure? If not, how will the treasurer know how much money to credit or transfer to the agency?
41. Subsection (1) of section 39-28.6-104 of the proposed initiative requires the treasurer to credit the revenue collected pursuant to the nicotine tax to the agency, while subsection (2) states that the revenue may lawfully be credited to the Colorado out-of-school education fund. Will the revenue be credited or transferred to the agency or to the Fund?
42. The Colorado out-of-school fund does not appear to exist in the Colorado Revised Statutes and does not appear to be created in the proposed initiative. Is it your intent to create the fund in the proposed initiative? If so, please consider



specifically creating the fund, as a reference to the fund does not clearly indicate that you intended to create it.

43. Do you anticipate any constitutional issues in connection with exempting the revenue generated by the nicotine tax from the requirements of article XXIV of the state constitution by statute, rather than by amending that constitutional provision?
44. By specifying that the tax on nicotine products may be extended or reauthorized by the general assembly, would additional voter approval be required at that time or would approval of this measure constitute voter approval for the general assembly to extend the tax in the future?
45. Regarding section 39-28.6-105 of the proposed initiative:
  - a. Is approval of this provision a voter-approved revenue change to allow the state to retain and spend revenue that it would otherwise be required to refund under section (7)(d) of article X of the state constitution (TABOR)? In common parlance, would the measure de-Bruce the amount specified?
  - b. To what does "any other law" refer?
  - c. Through the authority the voters conferred when they approved Referendum C, the state is permitted to retain and spend revenue up to the excess state revenues cap. As such, it appears that this provision would only allow the state to retain and spend more revenues when the state revenue would otherwise be above the excess state revenues cap. Is that correct?
  - d. Does this provision otherwise impact the amount of revenue that the state may retain and spend under Referendum C?
  - e. There is pending legislation (House Bill 19-1257) that would allow the state to retain and spend all state revenues that would otherwise have to be refunded under subsection (7)(d) of TABOR. If that bill and this initiative were both approved by voters, how would the two measures work together?
  - f. Is it your intent that this measure be referred to the voters at the 2019 ballot because this language is a state matter arising under TABOR as defined in section 1-41-102 (4)(d)?

46. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
- b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).

## **Technical Comments**

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. In the proposed article 86.1 of title 22, section 22-86.1-100 should be renumbered 22-86.1-101 and the subsequent section numbers should be adjusted accordingly.
2. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names. Agency, department, or program names that are not in quotations are not capitalized.

3. Standard drafting practice has been updated to simplify internal references to the C.R.S. References are now rooted at the subsection level as follows:
  - a. Subsection: "subsection (2)"
  - b. Paragraph: "subsection (2)(a)"
  - c. Subparagraph: "subsection (2)(a)(I)"
  - d. Sub-subparagraph: "subsection (2)(a)(I)(b)"
4. In section 22-86.1-101, using standard drafting practice, the defined term "means . . ." not "shall mean . . ."