

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Amber Drevon and Charles Dukes

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

**DATE:** January 2, 2020

**SUBJECT:** Proposed initiative measure 2019-2020 #168, concerning the Colorado out-of-school learning opportunities program

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 the Colorado 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.

This initiative was submitted with a series of initiatives including proposed initiatives 2019-2020 #169 to #171. The comments and questions raised in this memorandum will not include comments and questions that will be addressed in the memoranda for proposed initiatives 2019-2020 #169, #170, and #171, except as necessary to fully understand the issues raised by the proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

## **Purposes**

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

1. To create the "Colorado Out-of-School Learning Opportunities Program" (program) within a newly established Colorado Out-of-School Learning Opportunities Agency (agency) within the Colorado Department of Education;
2. To establish a board of directors for the agency;
3. To specify the powers and duties of the agency to establish and oversee the program, including creating and developing criteria for the program;
4. To create or contract with a nonprofit organization doing business in Colorado to administer the program and to establish the duties of the administering nonprofit;
5. To establish parent-directed individual learning accounts (accounts) for eligible Colorado students under eighteen years of age to be used to pay certified providers for out-of-school learning opportunities, which opportunities provide supplemental educational or developmental support to eligible students outside of normal school operations;
6. To create and develop criteria for allowable uses of the money in the accounts, which uses include, in part, tutoring, targeted support for youth with special needs and learning disabilities, in-depth programs that teach youth new skills in the context of outdoor activities, and music and arts education;
7. To create and develop criteria for certifying providers of out-of-school learning opportunities under the program;
8. To create a competitive grant program for nonprofit providers to expand the capacity of free or low-cost programs that provide out-of-school learning opportunities in order to serve more students;
9. To eliminate all new corporate net operating loss deductions for income tax years commencing on or after January 1, 2021, but before January 1, 2036. The initiative allows net operating losses from prior tax years (presumably from tax years before January 1, 2021) to be carried forward as currently allowed;

10. To require the state treasurer to transfer any revenue increase that results from the elimination of the corporate net operating loss deduction to the Out-Of-School Learning Opportunities Fund; and
11. To specify that the revenue increase that results from the elimination of the corporate net operating loss deductions is a voter approved revenue change that is exempt from all revenue, spending and other limitations specified in TABOR.

## **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. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Colorado 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 twelve 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).
4. In proposed section 22-86.1-102 (5), an "out-of-school learning opportunity" could include a "system" that provides supplemental or developmental support to eligible students. What is an example of a "system"?

5. In proposed section 22-86.1-102 (5), an "out-of-school learning opportunity" does not include "payment of in-school private school tuition." What is "in-school private school tuition"? In what circumstances would it include private school tuition?
6. Could a parent use an individual learning account to pay for a summer daycare and enrichment program provided by a school district or private school and for which parents pay a fee, similar to a before- and after-school program that takes place during the school year?
7. Proposed article 86.1 of title 22 references the agency board's duty to "create and develop criteria." Will this be done through the adoption of agency rules pursuant to the provisions of the "State Administrative Procedure Act", part 1 of article 4 of title 24, Colorado Revised Statutes? Proposed section 22-86.1-104 (2)(e) refers to the agency board's power to promulgate "rules and regulations." Are these the same as "criteria"?
8. Does the agency board have the authority to set the uppermost income limit for eligibility for an individual learning account? Is the income limit based on contributions to the fund?
9. What does it mean that the agency must ensure that financial aid is "utilized in accordance with the relevant provisions of the Constitution of the United States and the Colorado Constitution"?
10. Does proposed article 86.1 of title 22 contain any provision to audit the individual learning accounts? How will the agency or administering nonprofit ensure that the money is used only for authorized uses under the program?
11. Pursuant to proposed section 22-86.1-103 (2)(m)(VII), no more than ten percent of eligible contributions received in any calendar year may be retained and spent on administrative expenses, unless that percentage is changed in later years. Does the dollar amount of contributions retained in a given year for administrative expenses need to be spent in that same year, or will it accumulate, such that more than ten percent could be spent on administrative expenses in a year?
12. How would the state treasurer know how much to transfer to the Out-Of-School Learning Opportunities Fund for deductions that were not allowed to be taken by a corporate taxpayer?
13. Are the proponents intending that the transfer be calculated on assumptions?

14. Are the proponents expecting that someone (the state treasurer, perhaps) review every corporate taxpayer's federal tax returns to see if the taxpayer claimed a federal net operating loss deduction and then extrapolate from that information what the net operating loss deduction would have been in Colorado?
15. Have the proponents considered whether or not the state treasurer has access to a corporate taxpayer's confidential tax returns? Could this be better handled by the department of revenue?
16. The calculations of revenues to be transferred will more than likely require an appropriation to the responsible entity for that work. Even if the state treasurer or the department of revenue is provided with an appropriation for this work, the calculations will not be precise. Without a requirement that a corporate taxpayer notify the state that it would have taken a net operating loss deduction were it available, all transfers will be based on estimates of corporate behavior. The proponents might consider adding such a requirement, but that might be challenged by corporations for being too burdensome.
17. The proposed initiative specifies that the transfer occur at the end of the fiscal year. Please consider that income tax does not necessarily operate on the same fiscal year.
18. The proposed initiative specifies that revenues collected "under this section" are a voter approved revenue change that is exempt from all revenue, spending and other limitations specified in TABOR. The remainder of section 39-22-504 provides various net operating loss deductions and rules for claiming such deductions. Deductions do not generate revenue. Please consider changing the language to "under this subsection (7)".

## **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. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a

duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."

- a. In proposed section 22-86.1-103 (2)(m)(III) the language should read, "Members of the board of directors **are not** entitled to compensation, but may **receive** reimbursement."
  - b. In proposed section 22-86.1-104 (1)(b) the language should read, "Members of the board **are not** entitled to compensation."
2. When referring to a statutory article within the article, please include the article number. For example, in proposed section 22-86.1-102, the reference to "article" in the introductory portion should be "AS USED IN THIS ARTICLE 86.1, UNLESS THE CONTEXT OTHERWISE REQUIRES:"
3. Each paragraph, subparagraph, and sub-subparagraph that follows an introductory portion should end with a semicolon unless it has two sentences or it is the last provision:  
**X-X-XXXX. Headnote.** (1) Subsection:
  - (a) Paragraph;
  - (b) Paragraph; and
  - (c) Paragraph.(2) Subsection.
4. Proposed section 22-86.1-103 (2)(b) includes a typo in the middle of the paragraph. The word "an" beginning the sentence, "an allowable use of financial" in the middle of the paragraph should be capitalized.
5. In proposed section 22-86.1-105, and elsewhere in the document where the word is used, "moneys" should be changed to "money."
6. In proposed section 39-22-504 (7)(b) the internal reference at the end of (7)(b) should read, "as provided in subsection (7)(a) of this section."