STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Chad Cookingham and Camille Howells

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: February 4, 2020

SUBJECT: Proposed initiative measure 2019-2020 #250, 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.

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 and rules 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 18 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 fund accounts for eligible students on a sliding scale, with greater financial awards to middle- and lower-income students;
7. To create and develop criteria for allowable uses of the money in the accounts, which uses include, in part, tutoring in core subject areas, including reading, mathematics, science, and writing; targeted support for youth with special needs and learning disabilities; English and foreign language acquisition; in-depth programs that teach youth new skills in the context of outdoor activities; and music and arts education;
8. To create and develop criteria for certifying providers of out-of-school learning opportunities under the program;
9. 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;
10. To provide an income tax credit for income tax years commencing on or after January 1, 2021, but before January 1, 2036, for 100% of any monetary contribution to the nonprofit organization selected to administer the program. The tax credit is not refundable, but unused portions may be carried forward to future income tax years, and the aggregate amount of all income tax credits claimed is limited to a specified amount every fiscal year;
11. To establish that any contributions that lead to the availability of the income tax credit may not be directed, restricted, or conditioned by an eligible taxpayer or contributor in certain specified manners;

12. To reduce the corporate net operating loss deductions for income tax years commencing on or after January 1, 2021, but before January 1, 2036, in an amount to be determined by the executive director of the Department of Revenue in order to increase net tax revenue for each state fiscal year by an amount that equals as nearly as practicable the decrease in net tax revenue for that fiscal year attributable to the income tax credit described in purpose No. 10 described above.

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, C.R.S., 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 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.

4. In proposed section 22-86.1-102 (7), 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?

5. 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?

6. Proposed section 22-86.1-103 (2)(m)(IX) states that eligible contributions received by the administering nonprofit prior to January 1, 2022, must be retained solely for administrative and organizational start-up purposes, and subsection (4) states that the agency may solicit gifts, grants, and donations for administrative costs. What if there are no eligible contributions to the administering nonprofit for start-up expenses? What if there are no gifts, grants, and donations received by the agency for administrative and start-up expenses? Is it your intent that start-up administrative costs, potentially including both staff costs and costs to contract with an administering entity, will be paid from the general fund?

7. The proposed initiative adds a new section 39-22-121.5 for the income tax credit. Why did the proponents choose to place this new income tax credit here? Please use either section 39-22-130 or section 39-22-543 instead.

8. Have the proponents considered whether the contribution made to the nonprofit organization could also be considered a charitable contribution and thus possibly deductible under the federal income tax return and section 39-22-104 (4)(m), C.R.S.? Is it the proponents' intent that such a contribution receive both tax benefits?

9. The proponents have based the credit cap on the state fiscal year. However, income taxes are frequently not calculated on a fiscal-year basis. Most individuals file on a calendar year basis, and corporations can fashion their own fiscal year. Consequently, the use of a fiscal year cap can potentially cause calculation issues in the cap. Please consider revising.

10. The proposed initiative requires the Department of Revenue (DOR) to determine the cap that must be applied to corporate net operating losses (NOL or NOLs) claimed for income tax years commencing on or after January 1, 2021, but before January 1, 2036, at such a percentage so that enough revenue is generated by the cap to offset the revenue loss as a result of the income tax credit created in another section of the proposed initiative. However, the corporate NOL cap applies to the same income tax years as the income tax credit. How is the DOR going to be able to determine the cap for the corporate NOL deduction when the revenue loss attributable for the income tax credit is not going to be determined until well into the middle of 2022 (if even by then, consider the effects of late filers on the calculation of this cap) and the income

tax forms that would set forth the proposed corporate NOL cap would have to be printed at least six months before this information is available? Are the proponents expecting the corporate NOL cap to be based on assumptions? What if those assumptions are wildly off and excess revenue is collected. Is that excess revenue subject to TABOR?

11. When the state closes its fiscal year books (the audit process) the DOR may adjust prior year tax information impacting the amount of NOLs. How should these adjustments be incorporated into the corporate NOL cap in the proposed initiative?

12. Net operating losses are carried forward from prior tax years. Does the corporate NOL cap in the proposed initiative allow the DOR to cap all NOLs or just the NOLs claimed in the given tax year? What happens with NOLs that are not claimed in that tax year? Does the cap apply to those NOLs when claimed in the future?

13. The DOR does not have information on prior year corporate NOLs and they do not know the amount of taxable income taxpayers will have in any given year. NOLs can only be claimed if there is sufficient income. If the proposed initiative is intended to apply in a way to cap corporate NOLs from previous years that were not claimed, how can the DOR implement this provision?

14. Under current state and federal law, the corporate NOL deduction is capped at 80% of taxable income for corporate NOLs generated after 2018. How does the existing state cap affect the additional revenue calculation that the DOR must undertake under the proposed initiative?

15. The proposed initiative caps the corporate NOL from income tax years commencing on or after January 1, 2021, but before January 1, 2036. However, the current corporate NOL carryforward period is 20 years. In year 15, after the provisions in the measure expire, will taxpayers be able to claim any unused NOLs? Will this have a significant corporate income tax revenue reduction in year 15?

16. The General Assembly has introduced House Bill 20-1024 this session. How would that bill impact the proposed initiative?

17. The proponents should be aware that the DOR will have administrative costs requiring an appropriation for the management of the "fiscal year cap" and the corporate NOL cap.

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. When referencing a particular subsection within a section, using "paragraph," "subparagraph," or "sub-subparagraph" is no longer part of standard drafting practice. For example, "paragraph (m) of this subsection" should now be formatted as "subsection (2)(m) of this section."