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MEMORANDUM

March 2, 2004

TO: Jon Caldera
Randal De Hoof

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #91, concerning amending Amendment 23

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 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 appear to be:

1. To amend section 17 of article IX of the Colorado constitution, also known as "Amendment 23," as follows:
 - a. To repeal the requirement that total state funding for all categorical programs annually grow by specified minimum amounts;
 - b. To allow an exception to the requirement that, for the 2001-02 through 2010-11 state fiscal year, the statewide base per pupil funding, as defined by the "Public School Finance

Act of 1994," article 54 of title 22, C.R.S., as of December 28, 2000, for public education from preschool through the twelfth grade shall grow annually by at least inflation plus an additional one percentage point;

- c. To allow an exception to the requirement that, for the 2011-12 state fiscal year and each state fiscal year thereafter, the statewide base per pupil funding, as defined by the "Public School Finance Act of 1994," article 54 of title 22, C.R.S., as of December 28, 2000, for public education from preschool through the twelfth grade, grow annually at a rate set by the General Assembly that is at least equal to the rate of inflation;
- d. To specify that the required increases in the statewide base per pupil funding are to be suspended in any state fiscal year in which state fiscal year spending, as shown in the most recent revenue estimate prepared by the Governor in accordance with section 24-75-201.3 (2), C.R.S., or any successor statute, is not anticipated to increase by the maximum amount permitted by section 20 (7) (a) of article X of the Colorado constitution;
- e. To repeal the definition of "categorical programs" in section 17 (2) (a) of article IX of the Colorado constitution;
- f. To specify that moneys deposited in and appropriated and expended from the state education fund are subject to the limitation on state fiscal year spending set forth in section 20 (7) (a) of article X of the Colorado constitution in any state fiscal year in which state fiscal year spending does not increase by the maximum amount allowed by said section 20 (7) (a);
- g. To specify that moneys deposited in the state education fund are not to cause state fiscal year spending to exceed the limitation on state fiscal year spending set forth in section 20 (7) (a) of article X of the Colorado constitution;
- h. To allow an exception to the specified uses of moneys in the state education fund;
- i. To allow the General Assembly, upon approval of two-thirds of the members of both houses, to transfer moneys from the state education fund to the general fund in any state fiscal year in which state fiscal year spending, as shown in the most recent revenue estimate prepared by the Governor in accordance with section 24-75-201.3 (2), C.R.S., or any successor statute, is not anticipated to increase by the maximum amount permitted by section 20 (7) (a) of article X of the Colorado constitution;
- j. To specify that any moneys transferred by the General Assembly from the state education fund to the general fund are subject to the limitation on state fiscal year spending set forth in section 20 (7) (a) of article X of the Colorado constitution;
- k. To specify that the transfer of moneys from the state education fund to the general fund

shall not cause state fiscal year spending to exceed the limitation set forth in section 20 (7) (a) of article X of the Colorado constitution;

- l. To allow the Governor, upon declaration of a disaster emergency in the manner provided by law, to expend moneys in the state education fund;
- m. To limit the amount of moneys the Governor may expend from the state education fund when a disaster emergency has been declared to not more than 3% of the state fiscal year spending limit for the current state fiscal year;
- n. To require the repayment of any moneys expended by the Governor from the state education fund within 2 fiscal years;
- o. To repeal the restriction on the use of state education fund moneys to supplant the level of general fund appropriations existing on December 28, 2000, for total program education funding under the "Public School Finance Act of 1994," article 54 of title 22, C.R.S., and for categorical programs;
- p. To repeal the requirement that for state fiscal years 2001-02 through 2010-11, the General Assembly shall annually increase the general fund appropriation for total program under the "Public School Finance Act of 1994," or any successor act, by at least 5% of the prior year's general fund appropriation for total program;
- q. To repeal the exception to the requirement that the General Assembly annually increase the general fund appropriation for total program in any state fiscal year in which Colorado personal income grows by less than 4.5% between the 2 previous calendar years;

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

- 1. When a section of existing law is being repealed in its entirety, the amending clause specifies that the section is being "repealed." However, when portions of an existing section of law are being amended and other portions of the section are being repealed, the amending clause specifies that the section is being "amended to read" to more appropriately reflect all of the changes being proposed to the existing section of law and how that section will appear if the proposed changes are adopted. Would the proponents consider modifying the amending clause to more accurately reflect the proposed changes to section 17 of article IX of the Colorado constitution? Specifically, to be technically accurate, the amending clause should read: "Section 17 of article IX of the

constitution of the state of Colorado is amended to read:".

2. In section 17 of article IX of the Colorado constitution, existing paragraphs are identified by lower case letters, consistent with the form generally used in drafting provisions of the Colorado constitution and the Colorado Revised Statutes. The delineation used for subdivisions of sections of law are as follows:
 - (1) Subsection
 - (a) Paragraph
 - (I) Subparagraph
 - (II) Subparagraph
 - (A) Sub-subparagraph
 - (B) Sub-subparagraph
 - (b) Paragraph
 - (2) Subsection

Would the proponents consider using lower case letters to identify and refer to paragraphs in the measure?

3. When adding language before the first word of a sentence, the practice is to show the new language in ALL CAPS, then show existing law, including the former first word of the sentence, in lower case, even though the first letter of the former first word will no longer start with a capital letter. For example, in subsection (1), the proponents are proposing new language to appear before "In state fiscal year . . ." In this case, the word "In" should appear as "in" and the letter "I" should not appear stricken. Would the proponents consider following this practice throughout the proposal?
4. When referring to another provision of the Colorado constitution within a separate section of the Colorado constitution, the practice is to use the following format: "section 20 (7) (a) of article X of the this constitution." Would the proponents consider using this format when referring to other provisions of the Colorado constitution in the proposal?
5. When repealing a paragraph in a subsection of law, the practice is to strike the language after the letter designating the paragraph and to retain the existing paragraph letters for those paragraphs not being amended. The purpose is to allow any person researching the provision in the future to more easily track the current and former versions of the provision. In subsection (2) of the proposed measure, the proponents are proposing to repeal the definition of "categorical programs" in paragraph (a), retain the definition of "inflation" in paragraph (b), and reletter paragraph (b) as paragraph (a). The practice in this circumstance is to retain paragraph (b). If the measure is adopted, for historical purposes, paragraph (a) would appear as follows: "(a) Deleted by amendment". Paragraph (b) would appear as it currently appears in the constitution. Would the proponents consider retaining the existing lettering of the paragraphs in subsection (2)?
6. In the proposed new language in subsection (3), it appears that the word 'OR' between

"SUBPARAGRAPH (II)" and "PARAGRAPH (A)" should be changed to the word "OF". Would the proponents consider making this change?

7. In subsection (4)(a)(I) of the proposed measure, after the addition of the new language ("EXCEPT AS PROVIDED . . ."), the word "Revenues" should start with a lower case letter. Would the proponents consider making this change?
8. In the new paragraph (c) of subsection (4) of the proposed measure, in both subparagraphs (I) and (II), the internal reference to "this paragraph" mistakenly refers to paragraph "(b)," instead of paragraph "(c)." Specifically, in subparagraph (I), in the sentence beginning "Monies transferred . . . pursuant to this paragraph . . .", the correct reference is to "paragraph (c)." Also, in subparagraph (II), in the sentence beginning "Any monies expended pursuant to this paragraph . . .", the correct reference is to "paragraph (c)." Would the proponents consider correcting the internal reference?
9. For historical purposes, as described in question number 5., above, when repealing a subsection, the practice is to retain the number of the subsection, and if the subsection is repealed, it appears in the Colorado constitution as follows: "(5) Deleted by amendment." Would the proponents consider retaining the subsection (5) number for historical purposes?

Substantive questions:

1. It appears that the proposed measure would eliminate any required increases in total state funding for all categorical programs. Is that the proponents' intent?
2. By the time the proposed measure appears on the ballot, the General Assembly will have set the level of funding for all categorical programs for the 2004-05 state fiscal year, which presumably will be based on the current requirement in section 17 (1) of article IX of the Colorado constitution to increase the total state funding for all categorical programs by inflation plus one percentage point, and will have appropriated general fund and state education fund moneys for such purpose. Assuming the measure is approved by voters and takes effect upon proclamation of the Governor during the 2004-05 fiscal year, do the proponents intend the measure to allow or require a reduction in categorical program funding in the 2004-05 state fiscal year? How would a reduction be implemented? Would the proponents consider establishing the 2005-06 state fiscal year as the first year of implementation to avoid an in-year reduction in categorical program funding?
3. With regard to the exception specified in paragraph (b) of subsection (1) of the proposed measure to the requirement that the statewide base per pupil funding be increased annually:
 - a. It appears that the exception would be triggered if the general fund revenue estimate prepared by the Governor, with assistance from the controller, the office of state planning and budgeting, and the Governor's revenue-estimating advisory group, in accordance with

section 24-75-201.3 (2), C.R.S., or any successor statute, indicates that "fiscal year spending" will not increase by the maximum amount allowed pursuant to section 20 (7) (a) of article X of the Colorado constitution ("TABOR"). Section 24-75-201.3 (2), C.R.S., requires the Governor to prepare an estimate of "general fund revenues," not "fiscal year spending" as defined in section 20 (2) (e) of TABOR, which includes more than just general fund revenues. While the actual estimate prepared by the Governor may include other estimates, including fiscal year spending, the Governor is not required by section 24-75-201.3 (2), C.R.S., to prepare an estimate of fiscal year spending. Is this the appropriate estimate to determine fiscal year spending for purposes of the exception?

- b. What do the proponents intend the time frame to be for determining the exception? It appears that the exception could be triggered at any time during a state fiscal year and would suspend the increase requirement. Is this the proponents' intent? Would the proponents explain the timing of the exception?
 - c. What is meant by the term "suspended"? The American Heritage Dictionary, 2nd edition, defines "suspend" as "to cause to stop for a period; interrupt" or "to hold in abeyance; defer." When the exception is triggered, is it the intent that the increase requirement would be deferred, but that the General Assembly would have to reinstate and make up the increase at some point in the future? If that is the intent, when would the increase for the year in which it was suspended need to be implemented? If the intent is that the requirement would not apply, would the proponents consider using another word that better conveys that intent?
 - d. Paragraph (b) permits a suspension of the statewide base per pupil spending requirement for the current fiscal year whenever anticipated revenues are less than the TABOR state fiscal year spending limit. If spending is suspended at some level less than the rate of inflation plus one percentage point, how is the required statewide base per pupil spending determined in subsequent fiscal years? Will the required growth in spending in a subsequent fiscal year be applied to the lower suspended level of spending or the level of spending that would have been required if there had been no suspension? What happens if there are several years of suspended spending levels? Is there a lower limit for the statewide base per pupil spending level?
4. With regard to the new language in subsection (3) of the proposed measure that appears to create an exception to the provision that appropriations and expenditures from the state education fund are not subject to the statutory limitation on general fund appropriations growth and the constitutional limitation on fiscal year spending:
- a. The exception, as set forth in subsection (4) (a) (II) of the proposed measure, states that the "revenues deposited into the state education fund . . . shall be subject to the limitation on fiscal year spending . . ." when the exception applies. Do the proponents intend the exception to also include appropriations and expenditures from the state education fund

in state and school district fiscal year spending limits? If so, would the proponents consider clarifying the language in the exception to include appropriations and expenditures from the state education fund?

5. With regard to the exception specified in subsection (4) (a) (II) of the proposed measure:
 - a. The exception appears to require actual information about whether state fiscal year spending increased by the maximum amount allowed by TABOR. The information on actual revenues for purposes of determining fiscal year spending is not available until the end of the fiscal year in question or later. Do the proponents intend the determination of the applicability of this exception to occur after the end of the fiscal year? Would the proponents explain the timing of this exception and when it would apply?
 - b. If this exception is intended to include expenditures from the state education fund in a school district's fiscal year spending, do the proponents intend expenditures from the prior fiscal year to be included in the district's fiscal year spending for the prior fiscal year? It appears that the school district would not know whether to include the expenditures in its fiscal year spending calculation until after the expenditures are made. Is that the proponents' intent?
 - c. If the exception is triggered and revenues deposited in the state education fund are included in the state's fiscal year spending calculation, how does the last sentence of subparagraph (II) apply? What happens if, by including state education fund revenues in state fiscal year spending, the state exceeds its TABOR limit? Would state education fund revenues only be included in state fiscal year spending only up to the limit so as not to "cause" the state to exceed its limit, and any state education fund revenues above the limit would not be included in state fiscal year spending? Rather, do the proponents intend that if the state education fund revenues are included in fiscal year spending, and if by including those revenues, the state will collect revenues in excess of its TABOR limit, the state then has to refund the excess to taxpayers? Would the proponents considering clarifying the language to more clearly state the intent and effect of this provision?
6. With regard to new subsection (4) (c) (I) of the proposed measure, which appears to allow the General Assembly to transfer moneys from the state education fund to the general fund:
 - a. It appears that the transfer would only be allowed when the revenue estimate prepared by the Governor in accordance with section 24-75-201.3 (2), C.R.S., indicates that state fiscal year spending is not anticipated to increase by the maximum amount allowed under TABOR. As noted in question 3.a., above, the estimate prepared by the Governor is not required, pursuant to section 24-75-201.3 (2), C.R.S., to contain an estimate of "state fiscal year spending." Is this the appropriate estimate to be used for determining anticipated growth in state fiscal year spending?

- b. The measure allows the General Assembly, by a 2/3 vote, to transfer the moneys. How would this be accomplished? By resolution? By bill? If by bill, would the bill be subject to veto by the governor?
 - c. If the transfer allowed by subparagraph (I) occurs, can the transferred moneys be spent for any purpose? Are the transferred moneys required to be repaid? If so, do the proponents intend the repayment to occur by a specific time?
 - d. In the second sentence of subparagraph (I), which begins "Monies transferred . . .", as noted in Technical Question number 8., above, the internal reference to paragraph (b) appears to be incorrect. Additionally, is it the proponents intent to refer to transfers of moneys from the state education fund to the general fund by the General Assembly using the process outlined in *subparagraph (I)* of paragraph (c)? If so, would the proponents consider using a more precise reference (i.e., "pursuant to this subparagraph (I)") to better pinpoint the provision that allows the transfer by the General Assembly?
 - e. Similar to the questions in number 5.c., above, would the last sentence in subparagraph (I) preclude the General Assembly from transferring an amount of state education fund moneys that would result in the state's revenues exceeding its TABOR limit, or could the General Assembly transfer an amount of moneys that would increase state revenues over the state fiscal year spending limit and require the state to refund those excess revenues? Would the proponents consider clarifying the intent of this sentence?
7. With regard to new subsection (4) (c) (II) in the proposed measure, which appears to allow the Governor to expend up to a specified amount of moneys in the state education fund upon declaring a disaster emergency:
- a. What do the proponents intend the term "disaster emergency" to include? Do the proponents intend "disaster emergency" to have the same meaning as set forth in section 24-32-2103 (1.5), C.R.S.? Can the General Assembly define the term and the manner in which it is to be declared by law?
 - b. Section 24-32-2104, C.R.S., and in particular, subsection (4) of that section, outlines the procedures for the Governor to declare a disaster emergency. In other paragraphs of the proposed measure, the proponents have made specific reference to sections in the Colorado Revised Statutes, but in subparagraph (II), the measure, instead of referring to the specific section of the C.R.S. governing the disaster emergency proclamation, omits reference to the specific statute on point. Would the proponents prefer to specifically cite the statute that sets forth the manner in which the Governor can declare a disaster emergency?
 - c. For purposes of calculating the 3% of state fiscal year spending, how is "state fiscal year spending" defined? Is it to be based on current estimated TABOR revenues or some other

measure?

- d. Assuming state fiscal year spending is to be determined based on current estimates, what happens if the Governor expends 3% of estimated state fiscal year spending, but actual state fiscal year spending is lower than estimated, resulting in an expenditure that exceeds 3% of state fiscal year spending?
 - e. With regard to the allowable expenditures of state education fund moneys by the Governor, is the Governor limited to expending moneys that have not been appropriated or otherwise encumbered?
 - f. Is the Governor required to spend the state education fund moneys for disaster-related expenditures, or can the moneys be used for other purposes?
 - g. In the second sentence of subparagraph (II), which begins "Any monies expended . . .", as noted in Technical Question number 8., above, the internal reference to paragraph (b) appears to be incorrect. Additionally, is it the proponents intent to refer only to expenditures of moneys from the state education fund by the Governor using the process outlined in *subparagraph (I)* of paragraph (c), but not to transfers by the General Assembly pursuant to subparagraph (I) of paragraph (c)? If so, would the proponents consider using a more precise reference (i.e., "pursuant to this subparagraph (II)") to better pinpoint the provision that allows the expenditure by the Governor?
 - h. In terms of the time for repayment of the state education fund, do the proponents intend the repayment to occur within 2 fiscal years after the date of the expenditure or within 2 years after the fiscal year in which the expenditure was made? Would the proponents consider clarifying the intent with regard to the time for repayment?
 - i. How will the state education fund be repaid if moneys are expended by the Governor? From what source of revenues will the repayment be made?
 - j. Can the repayment of the state education fund be made in any increment over the two-year period? For example, can 1% be repaid in year 1 and 99% in year 2? Who determines the repayment, the General Assembly or the Governor?
8. With regard to the repeal of section 17 (5) of article IX of the Colorado constitution:
- a. By repealing the prohibition against using state education fund moneys to supplant the December 28, 2000, level of general fund appropriations for total program and for categorical programs, do the proponents intend to allow the General Assembly to use state education fund moneys to replace general fund appropriations for total program and categorical programs?

- b. By repealing the requirement that the general fund appropriation for total program be increased by 5% through fiscal year 2010-11, do the proponents intend to allow the General Assembly to use more state education fund moneys and less general fund moneys to fund the requirements of subsection (1) of the proposed measure?