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MEMORANDUM

March 22, 2004

TO: Beverly Ausfahl and Ronald Brady

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #108, concerning requirements for nonpublic schools that receive subsidies of public funds

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 express the intent of the people of the state of Colorado that nonpublic schools engaged in K-12 education that receive subsidies of public funds be subject to full public scrutiny and awareness.
2. To express the intent of the people of the state of Colorado that, as a condition of receipt of subsidies of public funds, nonpublic schools engaged in K-12 education comply with pertinent legal requirements applicable to other schools that are funded with taxpayer dollars.

3. To require all nonpublic schools receiving subsidies of funds to:
 - a. Adopt a nondiscrimination policy to ensure that eligible children are not excluded or treated differently based on their race, creed, color, gender, national origin, religion, ancestry, or disability;
 - b. Comply with the "Americans with Disabilities Act" to the same extent as any public school built in the same year as the nonpublic school;
 - c. Be subject to the Colorado open records laws to the same extent as a public school and, be required to provide any requesting person a copy of any final performance or financial audits performed on the nonpublic school;
 - d. Require that all students attending such nonpublic schools take all state mandated tests that are administered to students in public schools at the same grade levels; and
 - e. Be subject to the state's educational accountability requirements to the same extent as a public school.
4. To express the statutory definitions of the terms "nonpublic schools" and "subsidies of public funds" as they are used in the proposed measure.
5. To establish the effective date of the proposed measure as July 1, 2005.

Comments and Questions

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

Technical questions:

1. To conform to the style in which existing law and amendments to existing law are written, would the proponents consider:
 - a. Changing the amending clause of the proposed initiative from "ARTICLE IX OF THE CONSTITUTION is amended to BY THE ADDITION OF A NEW SECTION, to read:" to "Article IX of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:"?
 - b. Removing the hyphen in "NON-PUBLIC" that appears in the first sentence of subsection (1) of the proposed initiative and making it one word?
 - c. Capitalizing the first letter of the first word in each paragraph of subsection (2) and in

paragraph (b) of subsection (3) of the proposed initiative?

- d. Changing "COLORADO REVISED STATUTES" to "COLORADO REVISED STATUTES" in paragraphs (c) and (e) of subsection (2) of the proposed initiative?
- e. Replacing the word "tests" with the word "assessments" and adding the word "assessments" or "exams" after "Colorado student assessment program" in paragraph (d) of subsection (2) of the proposed initiative?
- f. Inserting the word "SECTION" before "22-60.5-201" in paragraph (f) of subsection (2) of the proposed initiative, before "22-60.5-306" in paragraph (g) of subsection (2) of the proposed initiative, before "22-60.5-102(3)" in paragraph (a) of subsection (3) of the proposed initiative, and before "22-60.5-102(21)" in paragraph (c) of subsection (3) of the proposed initiative?

Substantive questions:

1. Subsection (1) of the proposed initiative contains the phrase "non-public schools that are engaged in Colorado K-12 education". Does this phrase refer to nonpublic elementary and secondary schools in Colorado? Would the proponents consider clarifying this phrase?
2. What does the term "eligible child" mean as used in paragraph (a) of subsection (2) of the proposed initiative? Is there a definition of "eligible child" that currently exists in statute to which the proponents would consider referring in paragraph (a) of subsection (2)? Is the "eligible child" reference related to the Colorado Opportunity Contract Pilot Program, article 56 of title 22, Colorado Revised Statutes? Would the proponents consider including a definition of "eligible child" in subsection (3) of the proposed initiative?
3. a. Section 7 of article IX of the state constitution reads as follows:

Section 7. Aid to private schools, churches, sectarian purpose, forbidden.

Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

How do the proponents intend that the language of the proposed initiative, if adopted, be read with the existing provisions of section 7 of article IX of the state constitution?

- b. Section 34 of article V of the state constitution reads as follows:

Section 34. Appropriations to private institutions forbidden. No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

How do the proponents intend that the language of the proposed initiative, if adopted, be read with the existing provisions of section 34 of article V of the state constitution?

4. Paragraph (a) of subsection (2) of the proposed initiative prohibits discrimination against an "eligible child" on the basis of the child's "race, creed, color, gender, national origin, religion, ancestry, or disability".
- a. Do the proponents intend that "creed" mean something different than "religion"?
 - b. Do the proponents intend that an all-female nonpublic school is barred from excluding a male "eligible child"?
 - c. Do the proponents intend that a nonpublic school is barred from excluding an "eligible child" with a disability, no matter how severe?
 - d. Are the proponents aware that neither state nor federal law guarantees a "free appropriate public education" to a student who voluntarily attends a nonpublic school?
5. Paragraph (b) of subsection (2) of the proposed initiative requires the nonpublic school to comply with the federal "Americans with Disabilities Act of 1990" ("ADA") to the same extent as any public school built in the same year as the nonpublic school.
- a. If the ADA has more stringent requirements for state and local government buildings than it does for private buildings, do the proponents intend for the proposed initiative to supercede federal law?
 - b. Do the proponents intend that a nonpublic school be deemed a "place of public accommodation" as that term is used in the ADA?
 - c. If the ADA permits certain private buildings under three stories or under 3,000 square feet per floor to be constructed without an elevator, do the proponents intend that a nonpublic school meeting those criteria would no longer be entitled to that elevator exemption?
 - d. Do the proponents intend that a nonpublic school complete a self-evaluation of the school's policies and practices, as is required of a public entity?

- e. Do the proponents intend to require all newly constructed nonpublic schools that receive subsidies of public funds to be fully accessible, and that any alterations to schools built before the effective date of the ADA be accessible?
 - f. Do the proponents intend that older schools provide program accessibility as of January 26, 1995, through the alteration of existing facilities, the acquisition or construction of additional facilities, the relocation of a service or program to an accessible facility, or the provision of services at alternate accessible sites?
- 6.
- a. Paragraph (c) of subsection (2) of the proposed initiative requires that the state open records laws apply to nonpublic schools receiving subsidies of public funds to the same extent as public schools. Because there is no "Colorado Open Records Act" per se, and because article 72 of title 24, Colorado Revised Statutes, may not be the most accurate cite for what is commonly regarded as the state open records law, would the proponents consider modifying the references more specifically?
 - b. The reference to section 22-56-109 is actually a reference to the performance audit of the Colorado Opportunity Contract Pilot Program and not to a performance audit of a nonpublic school. Would the proponents consider modifying this provision to clarify their intent?
 - c. Would the nonpublic school be required to provide all of its records for review, even though it may be receiving subsidies of public funds only for a few students?
7. Paragraphs (d) and (e) of subsection (2) of the proposed initiative both refer to compliance with statewide assessments.
- a. Do the proponents intend that other accountability measures in state law, e.g., state model content standards or accreditation, apply to these nonpublic schools?
 - b. How do the proponents intend the provisions of sections 22-7-601 through 22-7-613 to apply to nonpublic schools? Would a nonpublic school be required to participate in the state data reporting system created pursuant to section 22-7-603, C.R.S.? Would a nonpublic school be required to participate in the requirements of the academic growth program created in section 22-7-603.7, C.R.S.? Would the department of education be required to calculate academic performance and academic improvement ratings for the nonpublic school, pursuant to section 22-7-604, C.R.S.? Would the nonpublic school be required to send out annual school accountability reports pursuant to section 22-7-605, C.R.S.? Would a nonpublic school be required to submit a school improvement plan and be potentially subject to conversion to a charter school pursuant to section 22-7-609, C.R.S.? Would a nonpublic school be eligible to participate in the closing the achievement gap program pursuant to section 22-7-611, C.R.S.? Would these requirements differ for a nonpublic school that receives subsidies of public funds for fewer than all of its students

or even a minority of its students, and, if so, in what way?

- c. If an eligible student enrolled in the nonpublic school takes a statewide assessment, how is that student's score counted? Does it apply toward the student's school district of residence or toward the nonpublic school, or is it calculated with all other students receiving vouchers?
8. In paragraph (a) of subsection (3) of the proposed initiative, a "nonpublic school" is defined. What is meant by a school performing an "academic function"? Would an on-line school meet this definition? Would a school within a school meet this definition? What is meant by the phrase "individuals associated for religious or other purposes"? Would this definition include a nonpublic home-based educational program as described in section 22-33-104.5, C.R.S.? Are private, nonsectarian schools included? It appears the proposed initiative would not apply to nonpublic schools that enroll fewer than ten students, even though the school receives subsidies of public funds. Is this the proponents' intent?
10. Paragraph (b) of subsection(3) of the proposed initiative defines "subsidies of public funds". What is meant by the phrase "provided pursuant to an agreement"? Does that phrase refer to a legally enforceable contract? What is meant by the phrase "or other arrangement"? Would public moneys "transferred directly or indirectly to pay for all or part of a child's education at a nonpublic school" include the provision of textbooks or instructional materials to a nonpublic school, or the payment of a translator for a deaf student enrolled in a nonpublic school? What is the effect of including the word "indirectly"?
11. The proposed initiative does not appear to contain a penalty provision. Is it the proponents' intent that the General Assembly would adopt statutes for the enforcement of the proposed initiative? What types of enforcement mechanisms or penalties do the proponents anticipate?