

STATE OF COLORADO

Colorado General Assembly

Kirk Mlinek, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Charles W. Pike, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

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 #90, 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, through state fiscal year 2010-11, 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 and total state funding for all categorical programs shall grow annually at least by the rate of inflation plus an additional one percentage point;

- b. To specify that for the 2004-05 state fiscal year and each state fiscal year thereafter, the statewide base per pupil funding for public education from preschool through twelfth grade shall grow annually by a rate set by the General Assembly that is at least equal to the rate of inflation;
- c. To repeal the requirement that the total state funding for all categorical programs grow annually;
- d. To provide an exception to the requirement that the statewide base per pupil funding grow annually by at least the rate of inflation 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 Governor to transfer moneys from the state education fund to the general fund in any state fiscal year in which the Governor is required to formulate and implement a plan for reducing general fund expenditures in that state fiscal year pursuant to section 24-75-201.5, C.R.S., or any successor statute;
- j. To specify that any moneys transferred by the Governor 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 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;
- m. 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;
- n. 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 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 general drafting 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 striking existing language and adding new language, the practice is to show the stricken language first, followed by the new language appearing in ALL CAPS. Additionally, when numerals or years are being amended, the practice is to strike one or two words preceding the number or year to make it easier for the reader to see the change. For example, in the proposed changes in paragraph (a) of subsection (1), the change to the 2011-2012 state fiscal year should appear as follows: "state ~~fiscal year 2011-2012~~ FISCAL YEAR 2004-05." Would the proponents consider making this change?
5. 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?
6. 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 general drafting 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)?
7. 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?
8. 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?

9. For historical purposes, as described in question number 6., 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. Subsection (1) repeals the reference to the Public School Finance Act of 1994 in defining the statewide base per pupil funding is this repeal inadvertent or is it intended to effectuate some other change to Amendment 23? Do the proponents envision that the repeal of the reference to the act makes any substantive change? For purposes of complying with Amendment 23, could the general assembly define statewide base per pupil funding to mean something other than how it is defined in the Public School Finance Act?
2. In subsection (1), it appears that the proposed measure would repeal the requirement that the statewide base per pupil funding for public education for preschool through twelfth grade annually be increased by the rate of inflation plus one percentage point for state fiscal years 2001-02 through 2010-11 and would instead require the statewide base per pupil funding to be increased at least by inflation for the 2004-05 state fiscal year and each state fiscal year thereafter, unless the exception specified in paragraph (b) applies. Assuming this measure appears on the November 2004 statewide ballot, is approved by the voters, and takes effect upon proclamation of the Governor sometime after the election and during the 2004-05 state fiscal year, this proposed modification prompts the following questions:
 - a. By the time the measure appears on the ballot, the General Assembly will have set the level for the statewide base per pupil funding 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 statewide base per pupil funding by inflation plus one percentage point, and will have appropriated general fund and state education fund moneys for the state's share of districts' total program based on the statewide base per pupil funding level. School districts throughout the state will have prepared and based their budgets on the assumption that they will receive state aid in an amount based on the inflation plus 1% increase in the statewide base per pupil funding. How do the proponents intend the provision to be implemented in the middle of the 2004-05 state fiscal year?
 - b. Would the General Assembly be required to enact a supplemental appropriation to reduce the level of the statewide base per pupil funding in the middle of the fiscal and school year and effectuate a rescission across all school districts? Would the measure allow the General Assembly to reduce the 2004-05 funding level? How do the proponents intend a reduction to be implemented?
 - c. Would the proponents consider establishing the 2005-06 state fiscal year as the first year

of implementation of the measure to avoid an in-year reduction for school districts?

3. It appears that the proposed measure would eliminate any required increases in total state funding for all categorical programs. Is that the proponents' intent?
4. With regard to eliminating the required increases in total state funding for all categorical programs, do the proponents intend the proposed 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?
5. 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 at least by the rate of inflation:
 - 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 inflation increase requirement. Is this the proponents' intent? If an estimate triggers the suspension, but a subsequent estimate shows that fiscal year spending will increase by or above the amount permitted pursuant to section 20 (7) (a) of the Colorado constitution, will the suspension continue to be in effect? What if early estimates would not trigger the suspension, but a later estimate would? 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 inflation increase requirement would be deferred, but that the General Assembly would have to reinstate and make up the inflation increase at some point in the future? If that is the intent, when would the inflation 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 (1) (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 limit. If spending is suspended at some level less than the rate of inflation, 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 occurred 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?
6. 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, the constitutional limitation on fiscal year spending, or any other existing spending limit:
- 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?
7. 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? Is it intended to somehow prohibit any transfer of moneys that would cause state fiscal year spending to exceed the state's spending limit? 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?

8. With regard to the new paragraph (c) in subsection (4) of the proposed measure, which appears to allow the Governor to transfer moneys from the state education fund to the general fund:
 - a. It appears that the transfer would only be allowed when the Governor is required to formulate a plan for reducing general fund expenditures. That requirement is contained in paragraph (a) of subsection (1) of section 24-75-201.5, C.R.S. Would the proponents consider more precisely referring to the section of the statute that imposes the requirement by including the subsection and paragraph references in the citation to section 24-75-201.5, C.R.S.?
 - b. Do the proponents intend the measure to allow the Governor to transfer state education fund moneys to the general fund when, pursuant to section 24-75-201.5 (1) (a), C.R.S., the revenue estimate for the current fiscal year indicates that general fund expenditures, based on appropriations in effect for the current fiscal year, will result in the use of at least one-half of the statutory general fund reserve? Would the proponents want to state that specifically rather than refer to the requirement in statute that is subject to change by the General Assembly? How would this provision work if, for example, the General Assembly amended section 24-75-201.5 (1) (a), C.R.S., to eliminate the requirement that the Governor formulate a plan for reducing general fund expenditures. If there is no statutory requirement to formulate a plan, would this transfer provision still be an option for the Governor?
 - c. Similar to the questions in number 7.c., above, would the last sentence in paragraph (c) preclude the Governor from transferring an amount of state education fund moneys that would result in the state's revenues exceeding its TABOR limit, or could the Governor 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?
 - d. If moneys are transferred from the State Education Fund to the General Fund, as specified in (4) (c), can the transferred moneys be used for any purpose? Are the transferred

moneys required to be repaid at any point in time?

9. 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?