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LEGAL MEMORANDUM

TO: Senator Maryanne ("Moe") Keller

FROM: Office of Legislative Legal Services

DATE: December 222008

SUBJECT: Whether a "hospital provider fee" is a tax for purposes of section 20 (4) (a) of article X of the Colorado constitution[1]

I. Background

You have proposed a bill that would establish a "hospital provider fee" to be paid by hospitals in Colorado to the department of health care policy and financing. Moneys generated by the provider fee would be used to obtain federal matching funds. Both the hospital provider fee and the matching federal funds would then be used to increase reimbursement rates for hospitals under Medicaid, the Children's Basic Health Plan ("CHP+"), and the Colorado Indigent Care Program ("CICP"), and to expand eligibility thresholds under Medicaid and CHP+.

II. Issue Presented

Would the imposition of a hospital provider fee to be used for increasing Medicaid hospital reimbursement rates and expanding Medicaid eligibility constitute a tax requiring voter approval for purposes of section 20 (4) (a) of article X of the Colorado Constitution?

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[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly, in the course of its performance of bill drafting functions for the General Assembly. OLLS legal memorandums do not represent an official legal position of the General Assembly or the state of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the General Assembly, OLLS legal memoranda generally resolve doubts about whether the General Assembly has authority to enact a particular piece of legislation in favor of the General Assembly's plenary power.

III. Conclusion

No. The intent of the hospital provider fee would be to increase reimbursements to the hospitals paying the fee, not to increase revenue for general governmental purposes. Therefore, the hospital provider fee would not be a tax requiring prior voter approval under 20 (4) (a) of article X of the state constitution.

IV. Analysis

A. Proposed Legislation

You have requested this office to draft a bill to impose a hospital provider fee. The proposed bill would contain the following general provisions:

- Creation of a fee that:
  - -- Would be assessed on hospitals based upon the number of patient days;
  - -- Would represent approximately 3% of the hospital's total patient revenue;
  - -- May be lower for rural or critical access hospitals;
  - -- May not be imposed on psychiatric and Medicare certification long term hospitals; and
  - -- Would be deposited into a hospital provider cash fund in the state treasury (the "cash fund").
- Provide that moneys in the cash fund would be used to:
  - -- Increase Medicaid, CHP+, and CICP hospital reimbursement rates; and
  - -- Increase the eligibility thresholds for Medicaid and CHP+, thereby increasing reimbursements to hospitals and other public health care providers.
- Ensure that the moneys in the cash fund would not
  - -- Supplant existing moneys appropriated for Medicaid, CHP+, or CICI; and
  - -- Would not revert to the general fund at the end of a fiscal year.
- Require that the department of health care policy and financing ("department") receive a match from the federal government at least equal to the hospital provider fee payments made by hospitals.
- Direction to the department to use moneys from the federal match to further expand eligibility for recipients under Medicaid and CHP+ resulting in increased payments to all providers, including but not limited to hospitals.

- Require that, due to the federal match, hospitals as a whole would receive more than the fees collected, although not every hospital would necessarily receive back the full amount of the fee it paid.

B. Is the proposed hospital provider fee a "tax" within the meaning of TABOR?

The issue has been raised whether the imposition of a hospital provider fee by the department is a tax requiring voter approval pursuant to section 20 of article X of the Colorado Constitution ("article X, section 20"). Article X, section 20 (4) (a), requires "voter approval in advance" for "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain." If the hospital provider fee is determined to be a "tax", it would require prior voter approval.

Since "tax" is not defined by article X, section 20, this office has developed guidelines, based upon Colorado judicial decisions, for the purpose of determining whether a pecuniary charge is a "tax" under this constitutional provision. The first step is determining whether a charge is a pecuniary charge imposed by legislative authority to raise money for a public purpose. In applying the first step of the analysis, the hospital provider fee may be a tax since it meets all three provisions of the first step. Based upon this conclusion, it is necessary to proceed to the second step of the analysis.

The second step requires a determination of whether the hospital provider fee qualifies as one of several types of charges that are not taxes. One type of charge that is not a tax is a "fee", which, based upon Colorado court decisions, we believe is "a charge which is made to defray the cost of a product, service, or regulation that is reasonably related to the overall cost, even though mathematical exactitude is not required, and which is not made primarily for the purpose of raising revenue for general public purposes." Since the purpose of the hospital provider fee is to increase reimbursements to hospitals, it is not intended to raise money for general public purposes. Thus, under the guidelines of this office, we believe that the proposed hospital provider fee would be a fee, not a tax requiring voter approval.

The determination that the hospital provider fee is a fee under article X, section 20, is consistent with Colorado Supreme Court decisions. In *Barber v. Ritter*, __ P.3d __ (Colo. 2008) (2008 WL 4767999), the Colorado Supreme Court specifically examined the distinction between a "fee" and a "tax" for purposes of article X, section 20. In *Barber*, the Colorado Supreme Court

held:

> A fee is distinct from a tax in that, "[u]nlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service." *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). To determine whether a government mandated financial imposition is a "fee" or a "tax," the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed. *Zelinger v. City and County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986).

(2008 WL 476799 at *30). The Court went on to hold:

> If the language discloses that the primary purpose for the charge is to finance a particular service utilized by those who must pay the charge, then the charge is a "fee." On the other hand, if the language states that a primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax. Moreover, the fact that a fee incidentally or indirectly raises revenue does not alter its essential character as a fee, transforming it into a tax. *Western Heights Land Corp. v. City of Fort Collins*, 146 Colo. 464, 469, 362 P.2d 155, 158 (1961).

(2008 WL 4767999 at *31). The issue in *Ritter* was whether the transfer of moneys in various cash funds to the general fund constituted a "tax policy change directly causing a net tax revenue gain" requiring voter approval under article X, section 20. In concluding that the transfers were not such a tax policy change, the court specifically found that fees intended to defray the cost of special services provided to those who paid the charge were not taxes.

The proposed hospital provider fee, similar to the fees in *Ritter*, would not be intended to raise revenues for general governmental spending. Rather, the fees would be used to increase reimbursement rates to the hospitals that paid the fees. The hospitals would benefit from paying the fees because the higher reimbursement rates would result in increased matching money from the federal government that would be used to both increase the hospital reimbursement rates and increase the number of persons eligible for benefits under Medicaid and the CHP+. As providers under those programs, the hospitals would see increased revenue generated by the increased number of

recipients. Thus, the hospital provider fee would not be intended to generate, and would not result in, increased revenues for general governmental purposes.

In an earlier decision, *Bloom v. City of Fort Collins*, 784 P.2d 304 (Colo. 1990), the Colorado Supreme Court discussed the differences between various types of assessments, including property taxes, excise taxes, special assessments, and special fees. Although the case arose before article X, section 20, was adopted, the Court's discussion contains some language that is helpful in distinguishing a fee from a tax:

> Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service. *See* 1 Cooley, *The Law of Taxation* § 33 (4th ed. 1924); O. Reynolds, Jr. *Local Government Law* §105. The amount of a special fee must be reasonably related to the overall cost of the service. . . Mathematical exactitude, however, is not required, and the particular mode adopted by a city in assessing the fee is generally a matter of legislative discretion.

Bloom, 784 P.2d at 308. The question in that case was whether a "transportation utility fee", assessed on property owners whose lots fronted on city streets and calculated on the basis of the number of linear feet of frontage, was actually a tax. The revenue was devoted to the maintenance of city streets. The Court held that the charge was not a tax so long as an accompanying transfer provision was not used. The Court stated:

> The ordinance creating the fee, however, is not devoid of all defect. Section 108A-13 authorizes the city council to transfer any excess revenues not required to satisfy the purpose of the ordinance to any other fund of the city. The transfer of a substantial amount of money generated by the transportation utility fee to some other city fund would be tantamount to requiring the class of persons responsible for the fee--the owners or occupants of developed lots fronting city streets--to bear a disproportionate share of the burden of providing revenues to defray *general governmental expenses* unrelated to the purpose for which the fee is imposed. The effect of such a transfer would be to render the transportation utility fee the functional equivalent of a tax.

Id., 784 P.2d at 311 (emphasis in original). Applying this reasoning to the hospital provider fee, the provider fee is not a tax because no portion of it is used to defray "general governmental expenses". The moneys collected pursuant to the provider fee are placed in the hospital provider cash fund, a special cash fund created for, and specifically limited to the use of, increasing hospital reimbursement rates under Medicaid, CHP+, and CICP. The hospital provider cash fund is separate from the general fund of the state from which general governmental expenses are paid. Moneys collected and credited to the cash fund are to be used only for the specified purposes. If any moneys remain in the cash fund at the end of a year, it does not revert to the general fund.

Additionally, the proposed hospital provider fee is very similar to the nursing home provider fee established in section 25.5-6-203, C.R.S. Under that section, similar to the proposed hospital provider fee, the department can charge a provider fee to nursing facility providers, the fee is deposited in a cash fund in the state treasury, moneys in the cash fund are used to obtain federal matching funds, and moneys in the fund and from the federal match can only be used for specified purposes relating to reimbursements of nursing facility providers. The nursing facility provider fee was not submitted for voter approval under section 20 (4) (a) of article X. The Colorado Supreme Court has held that there is a heavy presumption of constitutionality of enacted statutes and that the presumption of a statute's constitutionality can be overcome only if it is shown that the enactment is unconstitutional beyond a reasonable doubt. *Colorado Ass'n of Pub. Employees v. Board of Regents of the Univ. of Colo.*, 804 P.2d 138, 142 (Colo. 1990). As the nursing facility provider fee is presumed to be constitutional, given the similarities between it and the hospital provider fee, the hospital provider fee should also be presumed to be constitutional.

For these reasons, the hospital provider fee would be considered a fee and not a tax under *Ritter* and *Bloom* and would not be subject to voter approval under article X, section 20.

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