

STATE OF COLORADO

Colorado General Assembly

Natalie Mullis, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
Email: lcs.ga@state.co.us



Sharon L. Eubanks, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Stephen Fusco and C. Tim Taylor
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 23, 2021
SUBJECT: Proposed initiative measure 2021-2022 #25, concerning the Learning Enrichment and Academic Progress (LEAP) 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 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 to the Colorado Revised Statutes appear to be:

1. To create a Learning Enrichment and Academic Progress (LEAP) Program that, among other purposes, will primarily distribute financial aid to eligible children for "out-of-school learning opportunities";

2. To establish the Colorado Learning Authority and its powers and duties to oversee the LEAP Program;
3. To establish a board of directors for the Colorado Learning Authority and its powers and duties;
4. To define general eligibility criteria for financial aid and other requirements for the general administration of the LEAP Program;
5. To increase the retail marijuana sales tax by 5% and authorize the General Assembly to lower and increase it without further voter approval;
6. To fund the LEAP Program with the revenue from the 5% sales tax on retail marijuana; money from the general fund; and gifts, grants, donations, and loans from public or private sources;
7. To reallocate some of the proceeds the state receives related to public school lands from the permanent school fund to the state public school fund; and
8. To seek a voter-approved exception to the state's fiscal year spending limits for money that is administered by the Colorado Learning Authority.

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. Proposed section 22-86.1-101 (2) states that the intent of the program is that it will allow for "access to additional learning supplies and materials, especially for rural students". What are "learning supplies and materials"? Would the proponents consider defining the phrase?
4. Proposed section 22-86.1-101 (3) states, "families will have the authority and responsibility to choose programs, experiences, and activities that they believe to be the best fit for their child or youth." Does "responsibility" mean that participation in the Learning Enrichment and Academic Progress (LEAP) Program is mandatory?

5. Does proposed section 22-86.1-101 (6) assume that the state will not have to use the general fund to backfill the revenue that was reallocated from its current use to the state public school fund?
6. Do you intend for the measure be referred to the voters at the 2021 odd-numbered year election under article X, section 20 of the Colorado Constitution (TABOR)?
7. Proposed section 22-86.1-102 (3) defines "eligible child or youth" as "a child or youth who turns five years of age in a qualifying year." What is a "qualifying year"?
8. Proposed section 22-86.1-103 (1) establishes the Colorado Learning Authority as "an independent agency within the department of education." What does it mean that the Colorado Learning Authority is an independent agency? What, if any, is the relationship or oversight between the Colorado Learning Authority and the Department of Education?
9. Proposed section 22-86.1-103 (3)(a) requires the Colorado Learning Authority to "[s]eek to increase access to learning opportunities for every eligible child or youth". Does "seek to increase" mean this new LEAP Program is intended to build upon past or current efforts that have already been completed to this goal?
10. Proposed section 22-86.1-103 (3)(b) requires the Colorado Learning Authority to "[c]reate and develop criteria for the provision and selection of learning opportunities for distribution of funds, consistent with and in furtherance of the goals and purposes stated in proposed section 22-86.1-101, to be provided within the state of Colorado for eligible children or youth". Does this mean that the Colorado Learning Authority has the ability to define additional learning opportunities beyond what is defined as "learning opportunities" in proposed section 22-86.1-102 (7)?
11. Proposed section 22-86.1-103 (3)(b) states "[i]t is the intent of the people that the financial aid distributed will be new dollars to spend on new services and must not supplant existing public or charitable funding for programs available to eligible children or youth." If a school expanded an existing program, would that program be an eligible or acceptable use of financial aid?
12. Proposed section 22-86.1-103 (3)(d) states that the Colorado Learning Authority may "provide reasonable support to providers to ensure a broad representation of providers can meet the requirements of this subsection." What is "reasonable support"?

13. Proposed section 22-86.1-103 (3)(f)(II), (3)(f)(III), and (3)(f)(IV) creates distinct financial aid distribution requirements based on "calendar years." How does this harmonize with the other requirements throughout the proposed initiative based on "fiscal years"?
14. Proposed section 22-86.1-103 (3)(f)(IV) states that the Colorado Learning Authority "shall determine the financial aid award amounts to be provided to eligible children or youth and the method and timing of distribution." Does this mean that the prioritization proscribed in section 22-86.1-103 (3)(f)(I)-(III) is not applicable in 2024 and after?
15. Proposed section 22-86.1-103 (3)(f)(V), and elsewhere in the proposed initiative, refers to administrative rules. Will these rules be promulgated through the adoption of agency rules pursuant the "State Administrative Procedure Act," part 1 of article 4 of title 24, Colorado Revised Statutes?
16. Proposed section 22-86.1-103 (4) authorizes the Colorado Learning Authority to delegate "some or all" enumerated duties. Furthermore, proposed section 22-86.1-103 (4)(b) specifically states that the Colorado Learning Authority may "[e]nter into agreements and contracts as necessary with approved providers of learning opportunities under the program." Is the intention that the Colorado Learning Authority may delegate authority to an entity by contract to then enter into an agreement and contract with approved providers of learning opportunities?
17. Proposed section 22-86.1-103 (5) states that "[n]o more than ten percent of money from the learning enrichment and academic progress fund may be spent on administrative expenses in any fiscal year after the end of fiscal year 2025." How will administrative expenses be paid prior to this time? Do you intend for there to be any limitation on administrative expenses prior to this time?
18. Proposed section 22-86.1-103 (7)(a)(II) states that the Colorado Learning Authority shall ensure that the LEAP Program "[d]oes not discriminate against any eligible child or youth, eligible child or youth's family, or provider's religious affiliation". Proposed section 22-86.1-103 (7)(a)(IV) states the Colorado Learning Authority shall ensure that the LEAP Program "[d]oes not deny any child or youth the program's benefits based on the religious character of the provider." Are these two provisions substantively distinct?
19. Proposed section 22-86.1-103 (7)(b) states "[n]othing in this subsection (7) gives any person a private cause of action." Does that mean a person does not have a cause of action if the Colorado Learning Authority does not provide assistance to an eligible child or youth, discriminates based on religious affiliation,

- requires a course in religion or theology, or denies benefits based on the religious character of the institution?
20. Proposed section 22-86.1-104 (1)(b) states that the Colorado Learning Authority has the power "to sue and be sued." As the proposed initiative declares, the Colorado Learning Authority is an independent agency within the Department of Education. How does the power to sue and the ability to be sued intersect with the "Colorado Governmental Immunity Act," article 10 of title 24, C.R.S.? Does this statement waive governmental immunity for the authority?
 21. Proposed section 22-86.1-104 (1)(d) states that the transactions described in this proposed subsection (1)(d) must not "interfere with the mission of the authority as specified in proposed section 22-86.1-103." Where is the referenced mission in proposed section 22-86.1-103?
 22. Proposed section 22-86.1-105 (1) exempts professional officers and professional staff from the state personnel system. What is the purpose of exempting these people? What constitutes "educational in nature"?
 23. Proposed section 22-86.1-105 (3)(a) permits the learning opportunities parent advisory council and learning opportunities provider advisory council to "[p]rovide input to the board concerning the program, eligibility of children and youth," among other items. Is your intent to give the board of director's authority to establish eligibility criteria for eligible children or youth beyond what is statutorily proposed?
 24. Proposed section 22-86.1-106 (2) permits the Colorado Learning Authority to accept property and requires it to be credited to the fund. How are nonmonetary donations credited to the fund?
 25. Proposed section 22-86.1-106 (2) permits the Colorado Learning Authority to seek, accept, and expend "loans of funds." If the loans are multiple years, will the Colorado Learning Authority need prior voter approval under subsection (4)(b) of TABOR? Does the current law authorize the authority to seek that voter approval?
 26. Concerning proposed section 22-86.1-106, would the Colorado Learning Authority deposit the gifts, grants, or donations or loans in the Learning Enrichment and Academic Progress Fund?
 27. The transfers required by proposed section 22-86.1-106 (3) and (4) are the same amounts of income from public school lands that is transferred to the state

- public school fund. Is this just to establish a funding amount or is there some other connection between the two transfers?
28. Is the purpose of the second sentence in subsections (3) and (4) in proposed section 22-86.1-106 to seek voter approval for the state to retain and spend revenue as a voter-approved revenue change to the fiscal year spending limit in TABOR? If not, what do you intend the legal effect to be?
 29. What is the purpose of proposed section 22-86.1-106 (5)? The Colorado Learning Authority is within the Department of Education and is included in the state's fiscal year spending limit, and, as such, subsection (5) appears to seek voter approval for the same amount for which voter approval is sought under subsections (3) and (4) of proposed section 22-86.1-106. Do you intend to seek voter approval to retain and spend an amount that is equal to double the amount that is transferred?
 30. The voter approval sought under proposed section 22-86.1-106 includes gifts and federal funds, which both are excluded from the definition of fiscal year spending, and the tax increase set forth in proposed section 39-28.8-202 would be a voter-approved tax increase under subsection (4)(a) of TABOR. Are the voter-approved revenue changes set forth in subsections (3), (4), and (5) of proposed section 22-86.1-106 just for the general fund revenue that the state gives to the Colorado Learning Authority?
 31. Is the purpose of section 2 of the proposed initiative to allocate the specified proceeds to the state public school fund instead of the permanent school fund? If not, what is the purpose?
 32. Will the allocation to the state public school fund reduce the amount of money that is credited to the public school capital construction assistance fund created in section 22-43.7-104 (1), C.R.S.?
 33. Other than setting the amount of transfers required by proposed section 22-86.1-106 (3) and (4), what is the connection between the increased allocation to the state public school fund and the LEAP program?
 34. If the proposed initiative is approved by voters, the total retail marijuana sales tax under article 28.8 of title 39, C.R.S., will be 18% for sales made in 2022, 19% for sales made in 2023, and 20% for all sales made on or after January 1, 2024. Is that correct?
 35. The maximum rate is above the 15% that applied on or after January 1, 2014, until the passage of this proposed initiative. Accordingly, it appears that the

date in proposed section 39-28.8-202 (1)(b) should be amended to be January 1, 2022, or deleted altogether.

36. With the changes in proposed section 39-28.8-202 (1)(b), is it your intent that by approving this measure, the voters will be approving the initial tax increase and, if the rate is lowered, another a future increase up to any rate that is included in the initial tax increase?
37. Proposed section 39-28.8-202 (1)(b)(I) amends section 39-28.8-202 (1)(b)(I), C.R.S. Section 39-28.8-202 (1)(b)(I), C.R.S., states: "Establish a tax rate to be imposed pursuant to this subsection (1) that is lower than fifteen percent of the sale of retail marijuana or retail marijuana products." Proposed section 39-28.8-202 (1)(b)(I) states: "Establish a tax rate to be imposed pursuant to this subsection (1) that is lower than SUCH MINIMUM TAX RATE." The proposed section does not reflect how it intends to address the existing language in section 39-28.8-202 (1)(b)(I) "fifteen percent of the sale of marijuana or retail marijuana products." What is the intent for the language that was omitted from the proposal?
38. Concerning proposed section 39-28.8-202 (1)(b), could the General Assembly enact legislation to lower the tax imposed by the proposed initiative? Could the General Assembly eliminate it altogether?
39. Concerning sections 3, 4, and 5 of the proposed initiative, is it your intent that all of the new revenue from the phased-in marijuana sales tax increase be deposited in the newly created Learning Enrichment and Academic Progress Fund?
40. Concerning sections 3, 4, and 5 of the proposed initiative, is it your intent that the proposed initiative should not directly change the current allocation of the 15% retail marijuana sales tax revenue?

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. **Guidelines for statutory citations.** The number or letter of what you are referencing needs to be specified for every other level of reference, even when you are referring to a provision within the same. For example:

- a. Title: "this title 1"
 - b. Article: "this article 1"
 - c. Part: "this part 1"
 - d. Subsection: "this subsection (2)"
 - e. Paragraph: "this subsection (2)(a)"
 - f. Subparagraph: "this subsection (2)(a)(I)"
 - g. Sub-subparagraph: "this subsection (2)(a)(I)(b)"
2. When repealing existing language in statute, it is standard drafting practice to show all repealed language in ~~strike type~~. For example, in proposed section 39-28.8-202 (1)(b)(I): "Establish a tax rate to be imposed pursuant to this subsection (1) that is lower than ~~fifteen percent of the sale of retail marijuana or retail marijuana products~~; SUCH MINIMUM TAX RATE; or."
 3. Proposed section 22-86.1-105 (3)(b) states that the leaning opportunities parent advisory council and learning opportunities provider advisory council are charged with providing "recommendations to the appointing bodies for parent representation on the board." Because the governor is the sole appointing authority, "appointing authorities" should be singular.
 4. It is standard drafting practice to use "money" instead of "moneys". See proposed section 22-86.1-106 (6).
 5. Proposed section 22-86.1-102 (3) defines the term "eligible child or youth." The term should be used consistently in the document where the defined term is intended.
 6. Proposed section 22-86.1-102 (7)(b), (7)(c), and (7)(d) uses "includes" and "does not include" when defining a term. Standard drafting practice would use "means" or "does not mean" instead.
 7. The word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "must does not mean that a person has a duty."