

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Linda White and Rich Guggenheim
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 8, 2023
SUBJECT: Proposed initiative measure 2023-2024 #104, concerning public athletics programs for minors

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 require any interscholastic, intramural, or club athletic team, sport, or athletic event that is sponsored or sanctioned by a public athletics program for minors to specify whether each team, sport, or event is for:
 - a. Females, women, or girls;
 - b. Males, men, or boys; or
 - c. Coeducational or mixed.
2. To require that only students who are female based on their biological sex at birth may participate in an event designated for females, women, or girls.
3. To prohibit a governmental entity from investigating a complaint or taking any adverse action against a public athletics program for minors for complying with the requirements of this proposed initiative.
4. To create causes of action for a student or public athletics program for minors that suffers harm as a result of noncompliance with this proposed initiative.

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. Subsection (1)(b) of the proposed initiative states in part:

"[P]ublic athletics program for minors" means a public school, public school district, activities association or organization hosting, organizing, or facilitating public school athletics, or private school when its students or teams compete against a public school.

 - a. Is "hosting, organizing, or facilitating public school athletics" intended to include a public school, public school district, *and* activities association or organization? Or, is "hosting, organizing, or facilitating public school athletics" intended to modify only an activities association or organization? If it is the latter, would the proponents consider revising for clarity?
 - b. Is "activities association or organization hosting, organizing, or facilitating public school athletics" intended to apply to an activities association or organization that is exclusively for public school members? If not, would the proponents consider revising for clarity?

- c. Is "activities association or organization hosting, organizing, or facilitating public school athletics" intended to apply to an activities association or organization that exclusively facilitates athletics? If not, would the proponents consider revising for clarity?
 - d. Is the proponents' intent that this proposed initiative not apply to a private school if it competes against another private school?
3. Subsection (2)(a) of the proposed initiative states in part:
- Any interscholastic, intramural, or club athletic team, sport, or athletic event that is sponsored or sanctioned by a public athletics program for minors must be designated as one of the following, based on the biological sex at birth of the participating students ...
- a. Are both entities that have students participating in the event responsible for designating the event? Would the proponents consider revising for clarity?
4. Subsection (2)(b) of the proposed initiative states "[o]nly female students ... may participate on any team or in a sport or athletic event ..." Subsection (2)(b) continues to state in part "[n]othing in this section shall be construed to restrict the eligibility of any student to participate in any interscholastic, intramural, or club athletic team, sport, or athletic event ..."
- a. What is the proponents' intent with using different language for "any team or in a sport or athletic event ..." as opposed to "any interscholastic, intramural, or club athletic team, sport, or athletic event ..."? Is the different language intended to convey a distinct meaning? If not, would the proponents consider revising for consistency?
 - b. What is the proponents' intent with using different language for "any team or in a sport or athletic event ..." in subsection (2)(b) as opposed to "any interscholastic, intramural, or club athletic team, sport, or athletic event ..." in subsection (2)(a)? Is the different language intended to convey a distinct meaning? If not, would the proponents consider revising for consistency?
5. Subsection (3)(c) of the proposed initiative states in part:
- If a public athletics program for minors suffers any direct or indirect harm as a result of a violation of subsection (2) of this section, that public athletics program for minors has a private cause of action ... against any governmental

entity, licensing or accrediting organization, or public athletics program for minors that caused the harm.

- a. Is it the proponents' intent that the injured public athletics program for minors does not have a cause of action against an actor not listed here, even if the actor not listed commits an injury described?
6. Subsection (4) of the proposed initiative states in part "[t]he state shall assume financial responsibility for any expenses related to the lawsuit or complaint incurred ..."
 - a. What agency of the state do the proponents intend to accept the financial responsibility?
 - b. Is it the proponents' intent that the state assumes financial responsibility for any expenses related to a lawsuit or complaint involving a private school if the private school is the public athletics program for minors?
 7. Section 3 of the proposed initiative is a severability provision. Section 2-4-204, Colorado Revised Statutes, states:

If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid, unless it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court determines that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

- a. Section 2-4-204, Colorado Revised Statutes, generally applies to all statutes. What is the proponents' intent by including its own, unique severability provision?
8. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution generally prohibits state governmental entities from discriminating between the sexes, unless the government's rationale for distinguishing between them satisfies the intermediate scrutiny standard of being substantially related to an important governmental interest.
 - a. Do the proponents believe that only permitting a female to participate in a sport or activity designated for girls or females while not including the

same requirement for a sport or activity designated for males or boys violates the Fourteenth Amendment?

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. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado Constitution or the Colorado Revised Statutes.
2. For purposes of this proposed initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "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." The proponents should reconsider the use of "shall" and "must" in the proposed initiative.
3. "Biological sex," as defined pursuant to subsection (1)(a) of the proposed initiative, includes the specification of "at birth." The proponents should remove "at birth" in subsections (2)(a) and (2)(b) of the proposed initiative for uniform application of the defined term.
4. Section 3 of the proposed initiative is not drafted in a manner that would be included in statute. If the proponents want to include the severability clause in statute, the proponents should add it as a new subsection (5) to the new section 22-32-116.6 and include a reference to the change to section 24-10-106.
5. The effective date clause should be drafted as follows:

SECTION X. Effective date. This initiative takes effect if it is approved by the people at the next general election and becomes law, and, in such case, this takes effect on the date of the official declaration of the vote thereon by the governor.