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FORMAL OPINION	)	No. 12-02
OF	)	AG Alpha No. ED CI AGBDP
JOHN W. SUTHERS Attorney General	)	February 16, 2012

This opinion, requested by Brandon Shaffer, President of the Colorado State Senate, concerns the application of Colo. Const. art. X, § 20 (commonly known as the TABOR Amendment) to institute charter schools established under § 22-30.5-501, C.R.S.

QUESTIONS PRESENTED AND CONCLUSIONS

Question: Whether institute charter schools are subject to the limitations and requirements of Colo. Const. art. X, § 20, due to institute charter schools being either a "district", as defined by Colo. Const. art. X, § 20(2)(b), or being part of such a district?

Answer: Yes. Institute charter schools are districts under TABOR because they are state public schools and are essentially governmental in nature. They are created and authorized by the Colorado Charter School Institute, an administrative subdivision of the Colorado Department of Education, and are subject to the direction of the Institute Board and general oversight of the State Board of Education. CSI Charter Schools are primarily funded by the Department with state funds and are part of the statewide thorough and uniform system of public schools under the Colorado Constitution.

DISCUSSION

Taxpayer's Bill of Rights

The TABOR Amendment requires advance voter approval for the creation of any multiple-fiscal year direct or indirect district debt or other financial obligation, mandates an emergency reserve equivalent to three percent of fiscal year spending, and limits fiscal year spending by any "district". A "district", in turn, is defined as the state or any local government, excluding enterprises. Colo. Const. art. X, § 20(2)(b).

The question presented, therefore, turns on whether Institute charter schools constitute "districts" as that term is defined by TABOR. The Colorado courts have defined a "district" under TABOR to include entities that are "essentially governmental in nature". According to the Colorado Supreme Court, the best reading of TABOR is to exclude from state fiscal year spending limits only those entities that are non-governmental in nature. Thus, in *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 10 (Colo. 1993), the Colorado Supreme Court held that, although it was not a state agency, Great Outdoors Colorado is a "district" under TABOR because it is essentially governmental in nature, its authority was not confined to a specific geographic area, it addresses matters of statewide concern, and it was created by a statewide vote of the electorate.

Similarly, the Colorado Supreme Court has ruled that the E-470 Public Highway Authority is a district subject to the voter approval requirements of TABOR. *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859, 869 (Colo. 1995). The Authority was a joint venture of government entities organized for the purpose of operating and maintaining a fee-for-service public roadway and had the power to levy taxes without relation to the services provided, and thus was a governmental entity itself that qualified as a district under TABOR.

TABOR also does not define the term "local government" for purposes of defining a district subject to the requirements of TABOR. Local governments do not include entities with a limited purpose and geographic jurisdiction which are not funded with public funds. An irrigation district is not a local government entity under TABOR because it did not levy taxes on the public at large for general government purposes, and voting rights in the irrigation district elections were not based on the traditional one person one vote concept. *Campbell v. Orchard Mesa Irrigation District*, 972 P.2d 1037 (Colo. 1998). An urban renewal authority is not a local government and therefore not a district under TABOR. *Olson v. City of Golden*, 53 P.3d 747 (Colo. App. 2002).

Thus, entities that are essentially governmental in nature, address matters of statewide concern and are created and funded by state government are "districts" subject to the strictures of TABOR.

Application of TABOR to Institute Charter Schools

The Colorado Charter School Institute ("Institute") was established by the General Assembly as an independent state agency within the Colorado Department of Education authorized to approve or deny applications for institute charter schools. § § 22-30.5-503(1)(a) and 22-30.5-504(1), C.R.S. (2011). It is a public entity for purposes of the Colorado Governmental Immunity Act, has authority to promulgate rules pursuant to the Administrative Procedures Act and is subject to the Colorado Open Records Act and open meetings laws. § § 22-30.5-505(4) and 22-30.5-503(8), C.R.S. (2011). Thus, the Institute itself is an agency of the State and a district subject to the requirements of TABOR.

According to statute, a CSI Charter School is a public school with the governmental purpose of operating a public school within the statewide system of public education. It is a "public, nonsectarian, nonreligious, non-home-based school that operates pursuant to a charter contract authorized by the Institute". § 22-30.5-507(1)(a), C.R.S. (2011). Although a CSI Charter School may organize as a nonprofit corporation pursuant to the Colorado Revised Nonprofit Corporation Act, this legal organization does not affect its status as a public school for any purposes under Colorado law. § 22-30.5-507(4), C.R.S. (2011); *Dolores Huerta Preparatory High v. Colorado State Board of Education*, 215 P.3d 1229, 1233 (Colo. App. 2009). For purposes of tax-exempt financing, a CSI Charter School is a public school and a governmental entity. § 22-30.5-507(5), C.R.S. (2011). CSI Charter School employees are governmental public school employees eligible for retirement benefits under the Colorado Public Employees Retirement Association. § 22-30.5-512, C.R.S. (2011).

CSI Charter Schools are primarily funded by the State Department of Education with state funds. The Department adds each CSI Charter School's enrollment to their accounting school district's per pupil revenue funding formula and then withholds the CSI Charter School's per pupil revenue from the accounting school district's monthly state equalization payments and pays the withheld funds to the CSI Charter School. § 22-30.5-513, C.R.S. (2011). CSI Charter Schools are prohibited from charging tuition except under narrow statutory circumstances. § 22-30.5-507(6), C.R.S. (2011). Moreover, CSI Charter Schools may apply for grants and emergency loans from the institute charter school assistance fund administered by the State Treasurer. § 22-30.5-515.5, C.R.S. (2011). Although CSI Charter Schools may accept grants and donations and engage in private fund

raising, they are primarily funded by the Department with state funds and therefore cannot be an enterprise exempt from TABOR's restraints upon state fiscal year spending under the provisions of TABOR (an "enterprise" must receive less than ten percent of its annual revenue from governmental sources, Colo. Const. art. X, § 20(2)(b)).

CSI Charter Schools are created and authorized by a state government entity to serve an essential government function of providing a statewide system of public education. The Institute and CSI Charter Schools are part of the thorough and uniform system of free public schools to be established and maintained by the General Assembly as required by Colo. Const. art. IX, § 2 and are subject to the general supervision of the State Board of Education. § 22-30.5-503(6), C.R.S. (2011); *Boulder Valley School District RE-2 v. Colorado State Board of Education*, 2117 P.3d 918, 928 (Colo. App. 2009).

CONCLUSION

For the foregoing reasons, I conclude that CSI Charter Schools are districts subject to the requirements of TABOR. CSI Charter Schools are public schools performing an essential governmental function of providing a statewide system of public education. They are created and authorized by a state entity and are subject to the direction of the Institute and general oversight of the State Board of Education. CSI Charter Schools are primarily funded by the Department with state funds and are a public school and government entity under several state and federal laws.

As a district subject to the requirements of TABOR, CSI Charter Schools may not borrow funds or incur debt that extends beyond the current fiscal year without taxpayer approval and are required to maintain a TABOR emergency reserve. In the case of CSI Charter Schools, the "district" would be the State of Colorado, meaning that a statewide vote would be required to obtain taxpayer approval of any multi-year debt; clearly an impracticable burden.

Fortunately, other TABOR-compliant financing methods exist short of engaging in a statewide vote. These financing methods would include lease purchase financing that is subject to annual termination due to non-appropriation, or financial obligations that do not extend beyond the current fiscal year, and can be entered into without the required taxpayer approval under TABOR. These types of TABOR-compliance financing methods would, of course, remain available to CSI Charter Schools.

Issued this 16th day of February, 2012.

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