

July 5, 2001

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative Regarding Testing of Candidates for Public Office

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on June 21, 2001, that would require candidates for public office in Idaho to take a test when the candidate submits his or her declaration to be a candidate for any public office. In addition, the proposed initiative anticipates that the results of the test will be made available to electors via publication in the media and all publicly funded voter information. Pursuant to Idaho Code § 34-1809, this office has reviewed the proposed initiative and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this proposed initiative, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only," and the petitioners are free to "accept or reject them in whole or in part."

BALLOT TITLES

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standards in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

There are a number of procedural and substantive flaws that could make this proposed initiative vulnerable to a legal challenge. The entirety of the proposed initiative reads as follows:

In addition to other pertinent requirements for candidates registering to seek election to an Idaho public office, said candidate must take the high school exiting standards test for the school district in which they reside at the time of their registration. The results (test scores) will be released to the local

media for publication and voter information no later than fourteen (14) days prior to the election. The test results will be published in any informational guide released to the public to inform voters about the candidates and their qualifications. By requiring all candidates running for political office to complete the exiting standards test the public will be better informed concerning the qualifications of all political candidates.

In its current form, the proposed initiative does not offer any guidance concerning how its substantive provisions should be codified. The qualifications for various public offices are spread throughout the Idaho Code. This office recommends that the initiative's sponsors either amend each of the provisions governing qualifications for public office specifically or enact the proposed initiative as a stand alone code section within title 34, Idaho Code.

In addition to the procedural problem identified above, the proposed initiative presents a number of substantive problems. First and foremost, the proposed initiative would require candidates for any public office in Idaho to "take the high school exiting standards test for the school district in which they reside at the time of their registration." Implicit in this new requirement is the assumption that every school district in Idaho has adopted a high school exiting standards test. This assumption is incorrect. Based on information provided by the Idaho Department of Education, it is this office's understanding that most school districts in Idaho do not administer a "high school exiting standards test." There are some administrative rules that will go into effect in the future which would establish proficiency standards for certain subjects. However, even these new rules would not require school districts to administer a single "high school exiting standards test." If the school district in which a particular prospective candidate for public office resides does not administer high school exiting standards tests, it would be impossible for a prospective candidate to comply with the requirement created by the proposed initiative. The fact that it will be impossible to comply with the proposed initiative in most cases will render it very vulnerable to a court challenge.

The next potential problem created by the proposed initiative is whether additional qualifications can be created for state wide elected officials and state legislators via the Idaho Code. There is currently some uncertainty in Idaho concerning whether constitutional officers, such as state wide elected officials and legislators, can have additional qualifications imposed on their office other than those which are specifically enumerated in the Idaho Constitution. It is likely that the pending litigation surrounding the 1994 "term limits" initiative may resolve some of the uncertainty surrounding the ability to add additional qualifications via state law. In the meantime, it is important for the sponsors of the proposed initiative to understand that the additional qualifications the proposed initiative would impose may not apply to candidates either for statewide office or for the state legislature.

Next, the proposed initiative anticipates that the results of the tests taken by prospective candidates “will be released to the local media for publication and voter information no later than fourteen (14) days prior to the election.” This proposed language somehow suggests that the media may be required to publish the results of the test scores that would be required by the proposed initiative. Naturally, the First Amendment to the United States Constitution and Art. 1, § 9, of the Idaho Constitution prohibit the state from compelling a private business, such as a newspaper, to publish government sponsored speech. It is important for the sponsors of the proposed initiative to bear in mind that “local media” may decline to publish or publicize the test scores that would be generated by the proposed initiative.

Finally, the proposed initiative does not recognize that the statutes governing the election process for many local taxing districts exempt some taxing districts from holding elections when a candidate is running for public office without opposition. For example, Idaho Code § 31-1410(3) allows unopposed candidates for fire district commissioner to take office without standing for election. The current language of the proposed initiative suggests that a candidate who is running unopposed for a local public office would be required to take the high school exiting standards test despite the fact that the candidate may never stand for election if the candidate faces no opposition. Under these circumstances, there does not appear to be any utility in requiring an unopposed candidate to take a test when the candidate will not stand for election.

In conclusion, the proposed initiative will have to be substantially revised in order to address the legal flaws identified above. In its current form, the proposed initiative will likely be invalidated by a reviewing court.

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Mr. Lyndon Harriman, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

MATTHEW J. MCKEOWN
Deputy Attorney General
Intergovernmental & Fiscal Law Division