

COLORADO'S HOSPITAL PROVIDER FEE: USING AN ENTERPRISE FUND 1  
TO AVOID THE IMPLICATIONS OF THE TAXPAYER BILL OF RIGHTS  
(TABOR)

Running Head: COLORADO'S HOSPITAL PROVIDER FEE: USING AN  
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RESEARCH PAPER,

Colorado's Hospital Provider Fee: Using an Enterprise Fund to Avoid the Implications  
of the Taxpayer Bill of Rights (TABOR)

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**I. What is the Taxpayer Bill of Rights (TABOR)?**

Colorado is the only state to enact TABOR, which is a constitutional measure that limits the growth in state, and sometimes, local, spending, by restricting the amount of increase in government expenditures. The inflation rate is added to the population growth, and the state budget cannot be increased by a larger amount than the percentage derived. For example, if inflation increased by 1%, and the state population were to increase by .5%, then the state budget could not be increased by any more than 1.5%. If the state takes in more revenue than the 1.5% increase, the surplus has to be refunded to the taxpayers (Center on Budget and Policy Priorities, 2017). The only ways a community or state have available to increase their budget is through a mil levy override which has to go to the voters, or a supermajority vote of the legislature. Needless to say, mil levy override votes generally fail.

On the face of things, all things being equal, TABOR may seem to make some sense. Why not simply increase the budget by the increase in population, and then adjust for inflation? The problem is that all things are not equal. Population increases occur unevenly across demographics. For example, the population of senior citizens and children tend to increase faster than the population overall, and these segments of the population need more publicly funded services (Center on Budget and Policy Priorities, 2017).

## **II. History of TABOR in Colorado: a sidetrip worth taking**

Before we continue on our exploration of Colorado's approach to limiting governmental budgets, it is worth observing a few facts about the primary architect of the Taxpayer Bill of Rights, which became law on November 3, 1992.

TABOR was mainly the creation of Douglas Bruce of Colorado Springs, Colorado (Ballotopedia, 2018). Born in 1949, Bruce was a deputy District Attorney by the age of 23, and due to a vacant legislative seat, was appointed to serve in the Colorado General Assembly for one term, from 2008-2010. His brief two years under the dome were filled with controversy, including kicking the knee of a photographer at swearing-in (ABC, 2008), making derogatory remarks about immigrants (Fender, 2008) and a sexual harassment charge. Bruce reported that he'd been cleared of the charge, but then House Speaker Andrew Romanoff declined to comment (The Tribune, 2008). Weirdly, Bruce was also convicted of tax evasion, being found guilty of not filing his 2006 or 2007 taxes. State prosecutors were able to prove that Bruce used a charity he founded to hide millions of dollars and using the funds to further his political agenda (Fender, 2011). In January of 2018, he was denied an appeal to his 2012 convictions (Associated Press, 2018).

History never exists in a vacuum, yet we often forget the people and the context of the times behind the events that live on as law or as facts in a textbook. Nationally,

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President George H.W. Bush was defeated by Bill Clinton on the same day that TABOR passed. The country was in a recession, and Bush had alienated his base by breaking his promise not to raise taxes. Foreign policy was less important with the collapse of the Soviet Union, terrorism as we know it today was nonexistent, and Clinton's down-home message, "It's the economy, stupid" resonated with a lot of people seeking change (Kelly, 1992).

I heard Clinton stumping for gubernatorial candidate Libby Mitchell in Maine in November of 2010, and at that time it was easy to recall how the man who seemed to be able to pull an entire economy together on the back of an envelope had reinvigorated the nation at the end of the Cold War. In the space of an hour, I listened to him fix all of the infrastructure, monetary, and jobs problems in Maine without the benefit of a single note or teleprompter. It was easy to understand how the nation could have overwhelmingly favored this saxophone-playing, charismatic problem solver. So then, why did Colorado vote in such a regressive measure as TABOR in 1992, the same year that Clinton won the White House?

The answer is that Colorado was once a dependably Republican state (Hamm, 2017). However, urban centers have increased in population since 1980, and the people moving into those centers tend to have more liberal leanings. They may be from California or the East Coast, or they may have moved in due to the tech boom or the marijuana industry, a recent player in recent years. In all areas of the United States, we know that urban centers are generally more liberal in nature to begin with,

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as universities and more technical jobs are to be found in more populous areas, and rural areas tend to be more conservative. As David Graham said in a recent *Atlantic* article, “The United States is coming to resemble two countries, one rural and one urban. What happens when they go to war?” (2017). An interesting point made by this article is that due to the rural vote recently carrying the presidency and both houses of congress, Democrats are now turning to local and state ordinances to try to effect all manner of policy, from transgender rights to gun control. It very well could be that the dismantling of our nation into city-states has begun.

Colorado has now joined my home state of Maine as a state locked in the hopeless quandary of one region controlling politics due to population, and it's unclear what the answer will be on many issues, from gun control to teacher pay. Maine, probably one of the least-populated states in the nation given the overall land mass, has but two congressional districts, CD1 and CD2. CD1 is liberal, due to the cities of Portland and the coastal cities being therein located, and CD2 is more conservative, being rural, of a farming tradition, and inland.

This, then, is how TABOR could have come to exist in a predominantly Democratic sweep of the nation: in 1992, Colorado was still a very conservative state overall, without enough additional liberal population in the urban areas to defeat the measure. It may also be that in 1992, not enough was known about the creator of TABOR, Douglas Bruce, because the controversies surrounding his actions didn't begin until he came under press scrutiny as a result of his legislative appointment.

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Still, one might wonder why subsequent attempts to convince Coloradans that a repeal of TABOR is in order have failed (The Denver Post, 2015). The basic fact remains: no one likes paying taxes. It's easy to avoid thinking about the long-term repercussions of failing to support things like infrastructure and education when opening one's wallet. And maybe the average Coloradan shouldn't be blamed, per se, considering the cost of living. Here in Archuleta County; a rural, economically-challenged area, a basic rental for a family can run between \$1500-\$2500 a month, while professional, salaried jobs or skilled labor jobs are lacking. Studies are being done by an outside firm to identify solutions, but it's a slow process (Hudson, 2017).

### **III. How much TABOR tax refund do Coloradans typically get?**

When the state takes in excess revenue over current spending, a strange situation occurs. Rather than being able to address deficiencies in other parts of the state spending picture that occurred over the recession years, such as deferred increases to education funding and teacher salaries, the state must issue refunds to each and every taxpayer. Colorado spent \$9,245 per pupil in 2015 (Governing, 2015), putting the state down in the ranks low-spending states like Arkansas and Alabama, when meanwhile skyscrapers are going up by the day in Denver and the casual visitor sees nothing but swank restaurants and clothing shops flanking brick sidewalks (Brundin, 2016). The amount of refund that taxpayers get varies according to tax bracket, but it can be anywhere in the range from \$10 to \$250, with most in the range between \$13-41 (Frank, 2015). A stark example of this scenario was reported in 2014 on Channel 7

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Denver, because the Colorado Dept. of Transportation (CDOT) was uncertain whether a needed infrastructure project on I-70 could be completed if TABOR refunds went out in 2017. As a result of TABOR caps, CDOT has recently taken to developing public-private partnerships to get roads built. Private companies are contracted to build toll roads on speculation, essentially, paid a percentage of their cost through the state and then taking their profit from tolls that are collected at booths along the highway (Zelinger, 2014). An interesting observation is that the program aired in 2014, regarding TABOR refunds that could go out in 2017. It becomes clear that developing needed infrastructure or public spending planning is an onerous and crippling process in Colorado if policy makers must consider TABOR implications three years out. True, the state budget is a two year document, but the process still becomes much more complicated in light of TABOR.

Colorado voters *can* decide by referendum not to receive their TABOR refunds, and instead allow the state to reinvest the money in public projects. Since inception in 1992, TABOR refunds have gone out totaling \$2 billion dollars. The choice to refund would have involved setting aside \$125.1 million for Fiscal Year (FY) 2017 and \$392.6 million for FY 2018 (Brainerd, 2017).

**IV. Where is all this excess revenue coming from?**

There are a couple of streams of money that count as revenue in the Colorado state budget that confound the pencil pushers in Denver attempting to avoid TABOR. One is the relatively recent stream of marijuana tax revenue, which during the last



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round of budget negotiations in the legislature accounted for \$30.5 million dollars. Voters have previously approved through referendum that this money can be used for education spending, but due to even more TABOR hijinx, the money could have still been returned to taxpayers if state fiscal spending exceeded caps (Brainerd, 2017).

However, perhaps the biggest stream of income triggering TABOR refunds in the last budget cycle was the hospital provider fee. On April 21, 2009, Governor Hinkenlooper signed into law House Bill 09-1293, the Colorado Health Care Affordability Act (Hospital Provider Fee Oversight and Advisory Board, 2016). In short, each state was given the opportunity to expand federal Medicaid funding after the passage of the Affordable Care Act (ACA) during the Obama administration. Not all states have accepted these federal dollars, but Colorado has, on a bipartisan level, which is an interesting observation, considering that the states that have vehemently opposed expansion, such as Maine, have done so based on party line ideologies. It might also be noted that Kansas, a predominantly conservative state, seems to have no objection to wind turbines, while Maine's Republican legislators have generally managed to block attempts at both solar and wind power energy initiatives.

Colorado's method of accepting the federal matching dollars that came as a result of the ACA involved collecting a hospital provider fee that was then matched by federal Medicaid dollars. The hospital fees are assessed according to the size, location, and amount of charity care each hospital provides, and then redistributed according to a formula to ostensibly create a level playing field, though this hasn't

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always been the case. From October 2014 through September 2015, the state's hospitals paid fees to the state in order to gain those matching dollars totaled \$688.5 million (Hospital Provider Fee Oversight and Advisory Board, 2016). As a result, the federal government matched those payments in the amount of \$1.2 billion dollars. However, the initial fee payment counts as revenue to the state- triggering a surplus and potential TABOR refunds.

As noted above, the hospital provider fee is not the same for each hospital, and some hospitals are exempt. The system was initially designed using a formula to take into account that some hospitals provide a disproportionate share of charity care, and some hospitals in rural areas may not be able to pay as much initially in order to receive matching monies. In some cases, some hospitals, such as St. Luke's in Denver, were paying more in fees than they were receiving in reimbursements. The provider fee was projected in 2015 to collect more than \$750 million in the coming budget cycle (Frank, 2015).

**V. What happened, considering we're in the next budget?**

Enter a budgeting mechanism used in fees-based governmental systems: the enterprise fund. My own experience with this type of fund occurred while serving on the Rockland (Maine) City Council, and our local dump, aka the Solid Waste Facility, was facing a dire situation. In this New England fishing and quarrying town founded in 1854, the common practice was to throw garbage in an empty granite quarry just west of town. In time, the quarry had become filled with all sorts of industrial waste

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as well as general trash. It was relatively easy to revamp the station to separate out the household trash and truck it off to an incinerator in Central Maine, but the quarry continued to bubble and cook to such a point that the Environmental Protection Agency (EPA) decided that enough was enough, and we had to implement a cap and care program. The perpetual care alone was projected to cost at least \$250,000 a year, forever. The capping project would come in at nearly a million dollars.

Because the transfer station was part of the general fund budget, we had many users who didn't pay for the service, much like charity users of a hospital. These users were nonprofits who did not pay property taxes, which was the main source of revenue for the general fund. Rockland, as a county seat and as an arts destination, has a disproportionate share of nonprofit organizations. The challenge was to determine how to charge a fair fee to all users, without exempting the nonprofits. We were eventually able to create an enterprise fund, after several years of very contentious debate. As a result, anyone who comes in the facility is subject to fees. However, the difficulty that arose is that many of the nonprofits use commercial trash haulers who simply drove to less expensive transfer stations to the north and south of Rockland. The director of the station tried for a while to backfill the resultant hole in the budget with bringing in commercial construction and demolition debris, which was also a contentious issue in the community and ultimately presented its own set of problems when the commercial hauling companies defaulted on their fees.

The Colorado Legislature created an enterprise fund to solve the TABOR trigger caused by the hospital fees revenue when Senate Bill 254 passed on May 10, 2017. The hospital fees did in fact end up coming in over \$800 million in this past budget cycle, which would have triggered TABOR and would have necessitated other cuts to the health care system in Colorado in the amount of \$528 million in an attempt to avoid the TABOR trigger (Sealover, 2017).

#### **VI. Constitutionality of Enterprise Funds in Colorado**

The Colorado Constitution defines an enterprise as a “government-owned business authorized to issue its own revenue bonds and receiving 10% of annual revenue in grants from all Colorado state and local governments combined” (Colorado Revised Statutes, 2016). The problem that existed in the legal (and political) debate over the constitutionality of whether the hospital fee could become an enterprise fund had to do with the simple word, “grant,” in the legislative language defining enterprises. After TABOR took effect, the legislature did attempt to further define in the 1993 session some of the terms used in the new TABOR constitutional provision. However, their work did not extend to a further knowledge of what would constitute a “grant,” or “the state,” both of which are not defined in the constitutional statutes of TABOR, located in Article 10 of the Colorado Constitution. However, TABOR does define things that are *not* grants, one of which being federal funds. Eventually, the question had to be answered by the Colorado Supreme Court, after the legislature had already established several other enterprise funds, such as the lottery,

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veteran's community living centers, and a student loan division. Given that no legal challenge had been mounted to the creation of those funds, the Supreme Court in the *Nicholl v. E-470 Pub. Highway Authority* (1995) found that the Authority was "government owned," a business, and did not receive more than 10% of its annual revenue in grants from state and local governments, which became the deciding factor later in determining the definition of "grants" in regards to creating the Enterprise Fund for the hospital provider fees (van Mourik, 2017). Subsequent legal opinions and one more enterprise fund case continued to bolster the cause of an enterprise fund as being appropriate for the hospital provider fee (van Mourik, 2017) but in 2015 the Office of Legislative Legal Services, part of the state legislative policy wing, issued an opinion that an enterprise fund would *not* be constitutional, simply because all the fund would be doing would be collecting the provider fee in order to leverage more money from the federal government. The provider fee in and of itself was not a "fee for service," a primary requirement of an enterprise fund per the Colorado constitution (OLLS opinion, 2015).

Not everyone agreed with the OLLS opinion. On February 11, 2016, Trey Rogers of Lewis Roca Rothgerber Christie, LLP, and Jon Anderson of Holland and Hart, LLP, issued their own opinion (Rogers and Anderson, 2016). They determined that since the fee is collected to access a program, as opposed to simply leverage federal funds, the program itself is the service. Then, on February 29, 2016, Attorney General Cynthia Coffman weighed in with her opinion that a hospital fee enterprise would

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withstand a constitutional challenge (Coffman, 2016). Coffman's three points were that the hospital provider fee is not a tax, which the previous Nicholl decision held to be a determining factor in the business or enterprise designation. Second, she argued that in fact, the fee was in exchange for a service, as the hospitals were providing services for which they were not necessarily always compensated. Third, she pointed out that the entity would be financially distinct from the state parent government, which had been previously upheld as a criteria for an enterprise fund by both the Colorado Supreme Court and the Nicholl decision, as well as a subsequent enterprise fund decision determining the constitutionality of the fund mechanism being used in another infrastructure project. Subsequent to these legal machinations, the OLLS developed a flow chart to help future legislators determine whether an entity or fund could be qualified as an enterprise (OLLS, 2016). The flowchart is included below.

### **VII. Next Steps: School Funding**

The obvious question, at least to my mind, is whether the creation of the enterprise fund for the hospital provider fee will now free up much needed revenue that could be used for school funding, considering the legislature may not have to slash budgets as drastically in order to avoid the TABOR trigger. Recalling that the budget might have had to have been slashed by upwards of \$500 million if the enterprise had not been created, might it then stand to reason that if the more urban areas of Colorado continue to boom, marijuana tax money continues to flow, and

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Colorado's economy continues to recover from the recession, this revenue could eventually be designated for school improvements and teacher salary increases?

The answer to that question is yes. Sort of. The bill that did, in fact, create the hospital provider fee enterprise fund was essentially an omnibus bill, which many pieces of major legislation must be in order to bring all interests to the table and agree to compromise. Therefore, many parts and pieces of policy exist within the bill, not just the hospital provider fee enterprise fund designation.

The piece of legislation is called the Sustainability of Rural Colorado Act, and it exists as Senate Bill 17-267. In the bill are provisions for items such as capital construction, education and school finance, and higher education (SB-17-267, 2017). The act also increased the marijuana tax rate, which is how school funding is proposed to be increased. Of the 90% of the increase in this tax, 15.56% will stay in the general fund, 71.85% will be credited to the marijuana tax cash fund, and 12.59% will be credited to the state public school fund and distributed to all school districts as specified in section 4 of the act. Section 4 then requires \$30 million of the marijuana tax monies to be transferred to the state public school fund for FY 2017-18, and then appropriated to the department of education and allocated 55% to large rural school districts and 45% to small rural school districts, and then distributed to the large and small rural school districts therein on a per pupil basis. Section 4 also requires that all of the state marijuana sales tax revenue that is transferred to the state public school

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fund in subsequent years be distributed to all schools and charter schools (SB-17-267, Section 4, 2017).

In other words, it's not going to be a lot of money. However, a second piece of legislation also passed in the final hours of the 2017 legislative session, Senate Bill 296, which will add \$262 million for about 1800 public schools and 905,000 students (Colorado Education Association, 2017). The trouble, though, is that due to something called the "budget stabilization factor," cuts to education in Colorado in this budget cycle will remain at \$828 million dollars. The budget stabilization factor is discussed in the conclusion section of this paper.

There may also be some good news in that schools could see an increase in available money from the marijuana tax cash fund, but the drawback is that these funds are generally available through competitive grant funding for specific projects rather than distributed to schools for general education purposes. The tax cash fund is used generally to help with issues like homelessness, mental illness, reducing incarceration, and targeting illegal marijuana sales. The state Dept. of Education received \$9.7 million from this fund in the previous budget cycle in order to add 150 health professionals in high schools across the state (Calfas, 2017).

How the state deals with funding programs in light of TABOR might take us back to the beginning of our journey, in which I pondered on the nature of urban vs. rural voting patterns, and the recent trend of addressing local level governmental bodies to try to effect broad scope policy issues stalled at the national level. If it is true that



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TABOR cannot be repealed in the near future, it very well may be that enterprise funds continue to be created, and perhaps at more local levels, effected by local constituencies at the level of local government. In Colorado, the trend of charter schools may also speak to this necessity of invention. Whether it makes fiscal policy sense or not, given that centralized services tend to cost less, there is a growing trend in that people are beginning to take government and the administration of their services into their own hands.

**VII. Conclusion: Could public schools become enterprise funds?**

Using the OLLS flowchart, it is not immediately clear that the public school system in Colorado could do an end-run around lack of state funding and create its own enterprise fund. The trouble with school funding in Colorado, as in many states, is that it is provided for primarily through local property taxes. Property taxes are low in Colorado as a result of the Gallagher amendment, which was passed in 1982, and requires that home valuation in Colorado comprise no more than 45% of the total valuation in the state. The reason the Gallagher amendment is creating problems recently is because of the housing boom in the more urban areas of Colorado.

Paradoxically, a boom time is creating budget woes for our state's schools- when the opposite should be true. Simply because of the volume of homes being built on the Front Range, we have a natural increase in the percentage of valuation across the entire state. When combined with soaring home prices, the percentage of valuation rises over the required 45%. As a result, a mandatory property tax break is triggered

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to keep residential homes in line with the 45% total valuation requirement (Eason, 2017).

There have been attempts to reverse the adverse effects of TABOR and the Gallagher Amendment on education: Amendment 23 was a constitutional change passed by voters in 2000 requiring K-12 funding to increase by 1% plus inflation from 2001-2011 and by inflation thereafter (Greater Education Colorado, 2018). However, like many voter-led mandates, the Colorado General Assembly has not honored this constitutional requirement. The Assembly reinterpreted the intent of Amendment 23, through a mechanism called the “negative factor,” and renamed the “budget stabilization factor” (or BS factor, as most educators call it) in 2017.

Here's how they got away with it: Amendment 23 designates .33% of Colorado's income tax to be put into the state education fund. To make sure that the legislature won't dip into the fund to stabilize the general fund in times of recession, Amendment 23 also required that the legislature increase general fund spending on K-12 by at least 5% each year before it could dip into the State Education Fund to meet the inflation requirement.

The trouble is, as always with legislative intent, verbiage. Amendment 23 specifies that “base” per pupil funding is the benchmark by which increases should be measured. The legislature managed to monkey with what “base” means, and designated as many categories as it could to a list of “factors,” such as local cost of living, the number of at-risk kids, and district size. As such, in 2009, the legislature

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determined that Amendment 23 meant that only the base amount was covered by increases- not the factors. As a result, the legislature was able to find ways to cut funding, in opposition of the intent of the amendment. Also starting in 2009, the legislature set a specified amount it wanted to spend on education, not reflective of the actual cost of education, and used the “negative factor” to scale back to the point they had set (Greater Education Colorado, 2018). As mentioned above, the negative factor in this budget cycle amounts to \$828 million dollars (Wetzel, 2017).

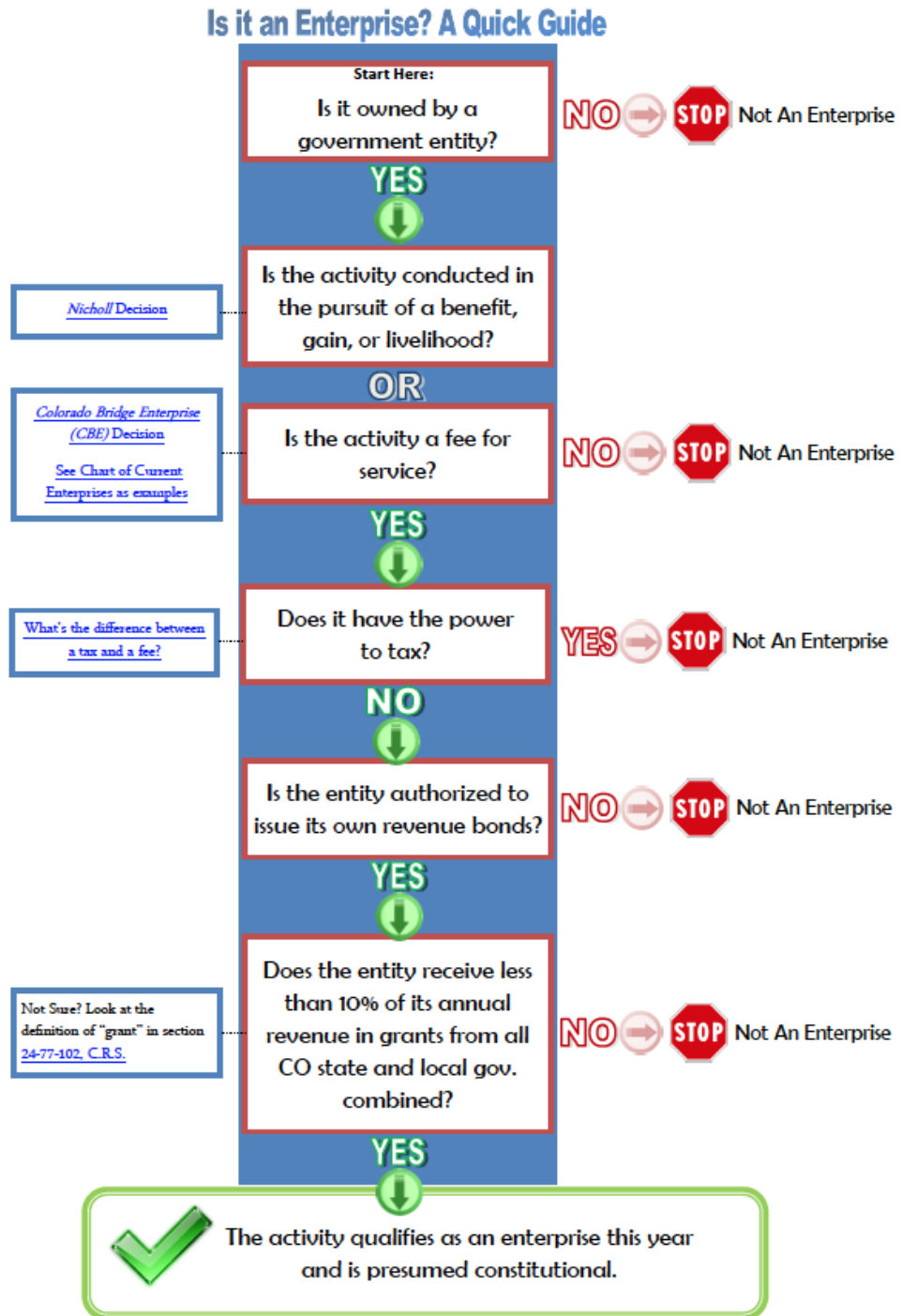
Even if Colorado's public schools could somehow be put in an enterprise fund designation, I'm not sure the legislative intent is present to see the project home. With the hospital provider fee, at stake were substantial matching monies from the federal government, which do not exist for public school funding to the same levels. Either the general fund budget would need to be dramatically cut to avoid a TABOR refund, or the enterprise fund created.

If we truly can't repeal TABOR, and the precedent of the hospital provider fee becoming an enterprise fund could guide us, perhaps rather than placing all of education funding into an enterprise fund (which is functionally impossible, as discussed above) an enterprise fund could be created through a fee imposed on the booming economic markets we are seeing in Colorado currently. For example, would a skyscraper developer really miss a couple hundred dollars impact fee? Sometimes, these fees can also be leveraged to access other grant monies or economic development monies. Traditionally, schools haven't fallen into economic

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development zone categorization, but I don't see why they couldn't. They can't exactly be rolled into tax increment financing, considering schools are nonprofits and they don't pay taxes, but maybe there could be tax benefits given to developers who are assessed an impact fee in order to provide for education in the areas they locate. Technically, property tax assessed on new development is supposed to add to the valuation that would be available for education, but considering the legislature has been so successful at raiding these monies, I propose that there could be a separate enterprise fund existing to receive impact fees that would be directly attributable to education. If we can assess a sewer fee, why can't we assess a local education fee? However, it very well may be that schools will eventually need to be directly under local control for this mechanism to work- which, if our country continues down the path of disintegration of centralized, federal government, may not be too far off. I am not in favor of this eventuality, however, considering that we may not have much choice about it, it very well could be that creative methods for funding public services, including impact fees and enterprise funds, will be a reality.

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