DATE FILED: February 28, 2024 10:59 AM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, **JENA GRISWOLD,** Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, fiscal summary, motion for rehearing, and the rulings thereon of the Title Board for Proposed Initiative "2023-2024 #142 'Parental Notification of Gender Incongruence'".....

.....**IN TESTIMONY WHEREOF** I have unto set my hand .....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this **22**nd day of February, 2024.

Jena Griswold

SECRETARY OF STATE

Final Text 2023-2024 #142

Be it Enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 22-1-144 as follows:
22-1-144. Parental rights - definitions - information regarding gender incongruence.

(1) Definitions. AS USED IN THIS SECTION, UNLESS THE CONTENT OTHERWISE REQUIRES

(a) "CHILD" MEANS A PERSON LESS THAN EIGHTEEN YEARS OF AGE WHO HAS NOT BEEN EMANCIPATED.

(b) "GENDER INCONGRUENCE" MEANS A DIFFERENCE BETWEEN A CHILD'S BIOLOGICAL SEX AND THE CHILD'S PERCEIVED OR DESIRED GENDER.

(**c**) "PARENT" MEANS A PERSON WHO HAS LEGAL CUSTODY OF A CHILD, INCLUDING A NATURAL PARENT, ADOPTIVE PARENT, OR LEGAL GUARDIAN.

(d) "PUBLIC SCHOOL" MEANS ANY PRESCHOOL, PRIMARY OR SECONDARY SCHOOL THAT RECEIVES STATE OR FEDERAL FUNDS.

(e) "PUBLIC SCHOOL REPRESENTATIVE" MEANS ANY PUBLIC SCHOOL ADMINISTRATOR, TEACHER, NURSE, CONTRACTOR, VOLUNTEER, OR ANY OTHER PERSON ASSOCIATED WITH PUBLIC SCHOOLS.

(2) **Information regarding gender incongruence.** ANY PUBLIC SCHOOL REPRESENTATIVE WHO OBTAINS INFORMATION THAT A CHILD ENROLLED IN THEIR PUBLIC SCHOOL IS EXPERIENCING GENDER INCONGRUENCE SHALL NOTIFY THE CHILD'S PARENTS WITHIN FORTY-EIGHT HOURS OF RECEIVING SUCH INFORMATION.

SECTION 2. Effective date - applicability. This measure shall be effective on and after the date it is declared by proclamation of the governor to have been adopted by the registered electors of the state and shall apply to instances occurring on or after the effective date.

Ballot Title Setting Board

Proposed Initiative 2023-2024 #142[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes requiring a school representative to notify the parents or legal guardian of a child's gender incongruence, and, in connection therewith, requiring any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian within forty-eight hours of receiving any information that the child is experiencing gender incongruence; defining gender incongruence as a difference between a child's biological sex and the child's perceived or desired gender; and applying the notification requirement to any preschool, primary, or secondary school that receives state or federal funding.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes requiring a school representative to notify the parents or legal guardian of a child's gender incongruence, and, in connection therewith, requiring any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian within forty-eight hours of receiving any information that the child is experiencing gender incongruence; defining gender incongruence as a difference between a child's biological sex and the child's perceived or desired gender; and applying the notification requirement to any preschool, primary, or secondary school that receives state or federal funding?

Hearing February 7, 2024:
Single subject approved; staff draft amended; titles set.
Board members: Theresa Conley, Jeremiah Barry, Kurt Morrison
Hearing adjourned 4:41 P.M.

[1] Unofficially captioned **"Parental Notification of Gender Incongruence"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Ballot Title Setting Board

Proposed Initiative 2023-2024 #142[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes requiring any person associated with any school to notify the parents or legal guardians that their child is experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided within 48 hours of receiving any information that a child is experiencing gender incongruence defined as a difference between a child's biological sex and the child's perceived or desired gender; applying the notification requirement to any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school regarding any child enrolled at any public, private, or parochial preschool, primary, or secondary school that receives state or federal funding.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes requiring any person associated with any school to notify the parents or legal guardians that their child is experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided within 48 hours of receiving any information that a child is experiencing gender incongruence defined as a difference between a child's biological sex and the child's perceived or desired gender; applying the notification requirement to any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school regarding any child enrolled at any public, private, or parochial preschool, primary, or secondary school that receives state or federal funding?

Hearing February 7, 2024:
Single subject approved; staff draft amended; titles set.
Board members: Theresa Conley, Jeremiah Barry, Kurt Morrison
Hearing adjourned 4:41 P.M.

Hearing February 21, 2024:
Motion for rehearing was granted only to the extent the Board made changes to the title.
Board members: Theresa Conley, Jeremiah Barry, Kurt Morrison
Hearing adjourned 11:33 A.M.

[1] Unofficially captioned **"Parental Notification of Gender Incongruence"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Mary Elizabeth Childs,
Objector,

v.

Lori Gimelshteyn and Erin Lee,
Proponents of Initiative 2023-2024 #142.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142

Through their legal counsel, Mary Elizabeth Childs, registered elector of Douglas County, hereby files this motion for rehearing on Initiative 2023-2024 #142.

On January 17, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #142:

The ballot title and submission clause as designated and fixed by the Board is as follows:

> *Shall there be an amendment to the Colorado Revised Statutes requiring a school representative to notify the parents or legal guardian of a child's gender incongruence, and, in connection therewith, requiring any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian within forty-eight hours of receiving any information that the child is experiencing gender incongruence; defining gender incongruence as a difference between a child's biological sex and the child's perceived or desired gender; and applying the notification requirement to any preschool, primary, or secondary school that receives state or federal funding?*

I. The Title Board lacked jurisdiction to set titles because key elements of the measure are so unclear that neither voters nor the Board can know the measure's scope and true intent, and this result is inconsistent with the single subject requirement.

Initiative #142 requires "public school representatives" to notify "parents" of a child experiencing gender incongruence. This reporting requirement is the essence of this measure.

A. The measure is excessively vague because voters will not understand the scope of persons specifically listed as "public school representatives."

"Public school representative" is defined as "any public school administrator, teacher, nurse, contractor, volunteer, or any other person associated with public schools." Proposed section 22-1-144(1)(e).

First, #142 expressly covers "volunteers" at a school. Thus, any person (including a parent) who reads to a class, helps decorate a classroom, or comes to talk about an issue within his or her specialized expertise is covered by this requirement. For anyone who has ever volunteered in a school setting, the hidden burden and responsibility imposed by this measure is staggering. In part, for this reason, Initiative 2021-2022 #94 (a measure that imposed the obligations of the Colorado Open Records Act on "educators" defined to include any "volunteer" at a school) was denied title setting because it violated the single subject requirement.[1]

Second, #142 covers "contractors." Are those just persons who provide services (substitute teachers, maintenance professionals, and technology specialists)? Or does it include providers of goods under contract with the school or school district (vendors who deliver foodstuffs to the school kitchen or who replace the school boiler or roof)? All are contractors who may see students in the school building and thus are covered by the measure.

This structural vagueness in the measure presents exactly the dangers the single subject requirement was supposed to avert. It was adopted to "prevent surreptitious measures" and to "prevent surprise and fraud from being practiced upon voters." C.R.S. §1-40-106.5(1)(e)(II). Among this Board's many duties, one stands out: "protecting the voters against confusion and fraud." *In re Initiative 1999-2000 #25*, 974 p.3d 458, 465 (Colo. 1999). The Board can fulfill that responsibility here by finding the measure is so confusing as to prevent the setting of a title and returning the measure to the proponents.

B. The measure is excessively vague because voters will not understand the reach of "any other person associated with public schools."

A "public school representative" is also "**any other person associated with** public schools." *Id*. Voters will not appreciate what it means to be "associated with" a public school insofar as this aspect is a key, hidden element of Initiative #142.

"[A]ssociated with" is a "general relational term." *Padilla v. Sch. Dist. No. 1*, 25 P.3d 1176, 1185 (Colo. 2001). "Associated" commonly means "connected with something else so as to exist or occur along with it." https://www.dictionary.com/browse/associated (last viewed Feb. 10, 2024). Applying this judicial standard and this common definition, "associated with" includes virtually everyone with some tie or relationship to a school – including but certainly not limited to every parent of every student at the school as well as every student at that school. It also includes coaches, tutors, and businesses that serve the schools.

[1] *See* https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/2021-2022index.html.

Voters will not understand that this subtle but complex element of #142 deputizes a wide swath of persons to be required to inform parents if a child is believed to be experiencing gender incongruence. A "yes" vote imposes a reporting requirement on children who become aware of a classmate's gender identity that varies from their sex as assigned at birth. And that the same "yes" vote means every parent who is privy to information (at a dinner conversation, a ride to a movie, or a class field trip) must notify the child's parents of what they have overheard. This mandate is both broad and concealed – from engaged voters as well as those who are uninformed about the specifics of this measure.

Proponents will likely argue they really intend a more narrow interpretation of this phrase, but that argument is unconvincing. Proponents specifically used "**any** other person" who has a relation to the public schools in the definition of "public school representative." "[T]he word 'any' means 'all.'" *Stamp v. Vail Corp*., 172 P.3d 437, 447 (Colo. 2007). The proponents affirmatively made this an overly comprehensive reporting duty.

Proponents seek to mask the reach of #142 by using the phrase, "public school representative." That phrase has an official ring to it, suggesting that the affected persons are authorized agents of the schools and thus are actual "representatives" of a school. But that is inaccurate. Volunteers and contractors – not to mention students and parents – have no such authority to act on behalf of a public school. They are nevertheless wound into the measure by its indistinct, confusing wording.

The single subject requirement was intended to prevent voters from realizing, too late, that they had enacted a measure with hidden aspects. As was true for other initiatives the Supreme Court has invalidated on single subject grounds, "this Initiative's complexity and omnibus proportions are hidden from the voter." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). Specifically, here, this measure hides the fact that #142 turns persons with only minor or episodic connections to a school into watchdogs on the issue of gender identity – watchdogs who must report to parents on the lives of children. This aspect of #142 is inconsistent with the single subject requirement, and the Board lacks jurisdiction to set titles.

C. <u>The measure is excessively vague because voters will not understand the reach of the definition of "public school."</u>

Initiative #142 ostensibly applies only to "public schools," but the definition the Proponents included is far broader, as it includes "any" school that "receives state or federal funds." Under this definition, $1 of public funds from the federal government or the state converts a private school into a "public school" for purposes of reporting. In fact, under the definition, there is no requirement that the state or federal government pay the funds to the school. It appears that government funds paid to a private person and then paid by that person to the school would trigger "public school" status.

This is not a speculative concern, as private schools in Colorado do receive federal monies. In fact, the Colorado Department of Education identifies more than 10 federal programs that also

affect private schools.[2] For example, for one program, a local educational agency allocates federal funds for at-risk students. "[T]he LEA must select private school children who are failing, or most at risk of failing, to meet high student academic achievement standards."[3] In another program, federal funds pay for professional development activities of educators, including "private school participants."[4]

Voters would have no way of knowing that the potential reach of the measure goes so far as to include private, including religious, schools. Yet again, this measure promises to result in exactly what the single subject requirement sought to prevent – voter surprise. *See* C.R.S. §1-40-106.5(1)(e)(II).

The scope of the "public school" definition also should be considered in relation to the expansive definition of "public school representative" described above. In religious schools, for instance, a "public school representative" would extend to religious authorities who are "associated" with the school.

Consider, for example, a religious school that receives funds under the state preschool program, rendering it a "public school." A clergy member who conducts confessions as part of religious education could hear from a student that (s)he is "experiencing gender incongruence." Under #142, the clergy member, although acting in a pastoral capacity, nonetheless now has a legal obligation to report what the child said to the child's parents.

The measure is extraordinarily broad in its sweep, such that voters will not understand what they are being asked to support or oppose. Such a measure violates the single subject requirement.

II. The title set by the Board is misleading to voters.

A. The use of "public school representative" is misleading.

For the reasons set forth above, "public school representative" is misleading and confusing to voters. If a title is set, it should be removed and replaced with a more descriptive phrase, based on the definition in the measure: "any person who is associated with a school."

B. Both of the title's references to "parents or legal guardian" are inaccurate.

The title's single subject statement states that the subject is "requiring a school representative to notify the parents **or** legal guardian of a child's gender incongruence." (Emphasis added.) The title later refers to "parents or a legal guardian."

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[2] https://www.cde.state.co.us/choice/nonpublic_programs (last viewed Feb. 14, 2024).
[3] https://www.cde.state.co.us/fedprograms/equitableservicesfaq-1 at 5 (last viewed Feb. 14, 2024).
[4] *Id.* at 5, 6.

The initiative defines "parent" as "a person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian." Proposed Section 22-1-144(1)(c). "Person" means "any individual, corporation, government or governmental subdivision or agency,… or other legal entity." C.R.S. §2-4-401(8).

*1. The measure requires that **all** parents be notified, but the title misstates this mandate.*

The relevant substantive provisions of the initiative impose the mandate that every "school representative" "shall notify the child's **parents** within forty-eight hours." Proposed Section 22-1-144(2) (emphasis added). Under #142, a legal guardian is a "parent," and the measure itself requires notice to all persons who qualify as "the child's parents." A school representative is not authorized to choose to notify either the parents or the legal guardian.

Given the use of the plural of "parent" in the initiative, the school representative must give notice to everyone who qualifies with that status. At times, parents consent to the appointment of a guardian for their child. *See Sidman v. Sidman (In re D.I.S.)*, 249 P.3d 775, 783 (Colo. 2011). This duality of a child's legal custodians can set up a potential conflict in who makes decisions for the child. *Id.*

Therefore, the title should reflect that the new mandate applies to "all" persons or entities that qualify as legal custodian of a child.

2. The measure requires notice to persons with "legal custody" of a child.

The initiative actually defines "parent" as any person "who has legal custody of a child." Examples of persons with such legal custody, as listed in #142, are natural parents, adoptive parents, and legal guardians.

This is far from a complete list of persons who can have legal custody of a child. For instance, under foreseeable and already statutorily prescribed circumstances:

- A "grandparent, or other suitable person" may be awarded legal custody of a child or youth. C.R.S. §19-3-508 (1)(b).
- A "child placement agency for placement in a foster care home or other child care facility" may be awarded legal custody of a child. C.R.S. §19-3-508 (1)(c).
- A court may enter "an order awarding legal custody of a child or youth to the department of human services or to a county department" of human or social services. *See* C.R.S. §19-1-115(6).

This is a demonstrative list of persons other than those listed in the measure's "including" clause in the "parent" definition. It is sufficient to establish that the initiative's definition of "parent" is much broader than acknowledged by proponents or reflected in the title as currently set.

Therefore, "parents and a legal guardian" is simply not accurate. The title should be revised to state that the required notification must be provided to "all individuals and governmental or private agencies having legal custody of a child" rather than "the parents or a legal guardian."

C. The title contains #142's definition of "gender incongruence," but that definition appears so far into the title that the nub of this measure remains hidden from voters.

The title uses "gender incongruence" twice before defining it. Voters must read through the title to the third phrase before they would know what the measure actually addresses.

A more insightful way for voters to understand the meaning of this measure is to insert after "to notify the parents or a legal guardian of" (or the more accurate wording about persons having legal custody of a child, as set forth above) the phrase: "a child that the child is experiencing a difference between the child's biological sex and the child's perceived or desired gender."

Alternatively, the definition could be reflected in a combination of the second and third phrases in the title:

> and, in connection therewith, requiring ~~any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian~~ such notice to be provided within forty-eight hours of receiving any information that the child is experiencing ~~gender incongruence; defining gender incongruence as~~ a difference between ~~a~~the child's biological sex and the child's perceived or desired gender;

D. If the Board finds that #142 comprises a single subject, it should only approve a ballot title that contains the following edits.

> An amendment to the Colorado Revised Statutes requiring any person who is associated with a school ~~a school representative~~ to provide notice to the persons who have legal custody of a child enrolled in a public school that the child is ~~notify the parents or legal guardian of a child's~~ experiencing gender incongruence, and, in connection therewith, requiring such notice to be provided ~~any school representative including an administrator, teacher, contractor, volunteer, or any other person associated with the school to notify parents or a legal guardian~~ within forty-eight hours of receiving any information that the child is experiencing ~~gender incongruence; defining gender incongruence as~~ a difference between ~~a~~the child's biological sex and the child's perceived or desired gender; defining parent as any person who has legal custody of a child, including a natural parent, adoptive parent, or legal guardian; and applying the notification requirement to any persons associated with any preschool, primary, or secondary school that receives state or federal funding.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #142 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution, or correction of the misleading ballot title set.

Respectfully submitted this 14th day of February, 2024.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142** was sent this day, the 14th day of February, 2024, via first-class mail, postage paid to:

Lori Gimelshteyn
26463 East Caley Drive
Aurora, CO 80016

Erin Lee
6787 Hayfield St.
Wellington, CO 80549

s/ Erin Mohr
Erin Mohr

SUMMARY
February 8, 2024

2024COA12

No. 22CA1714, *People in Interest of E.E.L-T.* — Family Law — Allocation of Decision-making Responsibility — Impasse Between Joint-Decision-makers — Best Interests of the Child

A division of the court of appeals, clarifying an issue not directly addressed in *In re Marriage of Thomas*, 2021 COA 123, holds that the district court need not find endangerment before breaking an impasse between parents with joint decision-making responsibility by making the disputed decision for the parents.

COLORADO COURT OF APPEALS **2024COA12**

Court of Appeals No. 22CA1714
City and County of Denver District Court No. 14DR30919
Honorable Christine C. Antoun, Judge

In re the Parental Responsibilities Concerning E.E.L-T., a Child,

and Concerning Robert Sean Larkin,

Appellee,

and

Lydia Dawn Toupin,

Appellant.

ORDER AFFIRMED

Division VII
Opinion by JUDGE TOW
Lipinsky and Grove, JJ., concur

Announced February 8, 2024

Colorado Legal Group, Hannah M. Clark, Denver, Colorado, for Appellee

Peak Legal Services, LLC, Todd Narum, Denver, Colorado, for Appellant

¶ 1 In this post-decree proceeding concerning the allocation of parental responsibilities for E.E.L-T. (the child), Lydia Dawn Toupin (mother) appeals the district court's order adopting a magistrate's order for the child to receive a COVID-19 vaccine. This dispute requires us to clarify an issue not directly addressed in *In re Marriage of Thomas*, 2021 COA 123: whether the district court must find endangerment before breaking an impasse between parents with joint decision-making responsibility. Concluding that no such finding is required, we affirm.

I. Facts

¶ 2 Mother and Robert Sean Larkin (father) are the unmarried parents of the child. Pursuant to the parties' court-approved parenting plan, they have shared responsibility for the child's medical decisions since 2015.

¶ 3 The parties reaffirmed their agreement for shared decision-making responsibility for medical decisions in 2021. However, they could not agree at that time whether the child should receive a COVID-19 vaccine.

¶ 4 Father thereafter filed a verified motion to modify decision-making under section 14-10-131, C.R.S. 2023, or,

alternatively, to authorize the then-seven-year-old child to receive a COVID-19 vaccine. In his motion, father asked the court to (1) grant him sole medical decision-making responsibility; (2) order the child to receive a COVID-19 vaccine and future boosters; or (3) grant him the authority to make decisions concerning the specific issue of COVID-19 vaccines (but not award him full decision-making responsibility).

¶ 5 After mother expressed "deep[] concern[s] about the minor child's health as it pertains to this vaccine," the district court magistrate set the matter for a hearing.

¶ 6 The magistrate heard from Dr. Mary Ellen Staat (a pediatric infectious disease specialist) and Dr. Katie Dickinson (the child's pediatrician), both of whom appeared as lay witnesses and testified that, in their personal experiences as clinicians, they had not seen serious adverse reactions or deaths result from the administration of a COVID-19 vaccine to a child. Dr. Staat further testified that the Centers for Disease Control and Prevention (CDC) recommended the vaccine for children five years of age and older. The magistrate also heard from mother's expert witness, Dr. Peter Andrew McCullough (an internal medicine physician and cardiologist), who

testified that the risk of COVID-19 vaccination for children outweighs the benefit, the vaccine had "alarmingly high rates" of serious adverse effects or death, and a healthy child should not receive the vaccine. Finally, mother testified that she had concerns about the lack of testing for the COVID-19 vaccines, as well as their efficacy and possible significant adverse effects.

¶ 7 After the hearing, the magistrate entered a written order that included the following findings of fact:

> The Court finds that the minor child is endangered and potentially endangering others by not having in place a party who can make decisions about whether the minor child can receive treatment surrounding the [COVID-19] virus. This issue will continue if not resolve[d] as different strains of [COVID-19] are emerging and booster vaccines are becoming available. Additionally, pursuant to those factors as enumerated in C.R.S. §14-10-124, [C.R.S. 2023,] that a modification of decision making is in the best interests of the child. As such, the Court finds, pursuant to C.R.S. §14-10-131, that the modification of decision making is appropriate, to have in place someone who can make decisions regarding [COVID-19] for the minor child, until he becomes an adult and can make decisions for himself.

¶ 8 The court then entered the following order:

> 1. [Father]'s Emergency Verified Motion to Modify Decision Making or alternatively, allow

> the Child to Receive the [COVID-19] Vaccine . . . is GRANTED.
>
> 2. Minor child may receive [COVID-19] vaccines along with subsequent boosters with parties agreeing to the type of vaccine. If no agreement on the type of vaccine[,] the child may receive the vaccines . . . from Pfizer.
>
> 3. Parties will retain joint decision making on all major decisions surrounding the minor child.
>
> . . . .
>
> 5. The Court finds these orders are in the best interests of the minor child.

¶ 9 Mother timely filed a C.R.M. 7(a) petition seeking relief from the magistrate's order, arguing, among other things, that the evidence did not support what mother characterized as the magistrate's finding that the child was endangered by not receiving a COVID-19 vaccine. The district court rejected mother's argument:

> The magistrate did not find that the minor child is endangered by not having the vaccine, but only that the minor child is endangered by not having *a party in place* to make decisions about the minor child's *treatment* surrounding the COVID-19 virus. The magistrate found it was in the best interest of the minor child "to have in place someone who can make decisions regarding [COVID-19]." . . . Based on the statements made within the order, this Court concludes that the magistrate did not make a factual finding that the minor child

> was endangered by not receiving the COVID-19 vaccine as [mother] alleges.

¶ 10 The district court went on to discuss the nature of the magistrate's order in light of father's three alternative requests. The district court initially characterized the magistrate's order as having selected father's second alternative — ordering that the child would receive the vaccine and future boosters. The district court concluded that the magistrate's order was "in accord with existing case law, and not legally incorrect."

¶ 11 However, later in the same order, the district court characterized the magistrate's decision as having "modified decision-making ability finding it was in the best interest of the minor child to have someone in place to make these decisions for the minor child."

II. Mootness and Show Cause Order

¶ 12 Before mother filed her notice of appeal, the child received a COVID-19 vaccine. We issued an order to mother asking her to show cause whether we had jurisdiction over what appeared to be a moot appeal.

¶ 13 An issue is moot when a judgment, if rendered, would have no practical legal effect on the existing controversy. *In re Marriage of Dauwe*, 148 P.3d 282, 284 (Colo. App. 2006). When an issue presented on appeal becomes moot by subsequent events, we will not render an opinion on the merits of the issue. *Id.*

¶ 14 The magistrate's order authorizes the child to receive an initial COVID-19 vaccine "along with subsequent boosters," as needed. Mother therefore asserts, and we agree, that the appeal is not moot. *See id.* We discharge the show cause order and consider mother's appellate contentions.

III. Appellate Standard of Review

¶ 15 Our review of the district court's decision is effectively a second layer of appellate review, and, like the district court, we must accept the magistrate's factual findings unless they are clearly erroneous. *In re Marriage of Sheehan*, 2022 COA 29, ¶ 22. "A court's factual findings are clearly erroneous only if there is no support for them in the record." *Van Gundy v. Van Gundy*, 2012 COA 194, ¶ 12. But we review de novo issues of law, including whether the magistrate applied the proper legal standard. *See Sheehan*, ¶ 22.

IV. The Nature of the Magistrate's Order

¶ 16 The parties do not agree on the posture of this appeal. Mother contends that the appeal concerns the magistrate's erroneous factual finding that the child was endangered by not receiving a COVID-19 vaccine. Father counters that the magistrate made no such finding and found only that the child was endangered "by not having in place a party who can make decisions about whether the minor child can receive treatment surrounding the [COVID-19] virus."

¶ 17 Both parties, however, appear to presume that the magistrate modified decision-making responsibility by giving father the authority to decide whether the child would receive a COVID-19 vaccine. For example, mother asserts that the magistrate "award[ed father] the ability to make the decision for the specific issue of the COVID Vaccine," while father contends that the magistrate did not "abuse her discretion in concluding that the tiebreaker should be" father.

¶ 18 In fairness to the parties, neither the magistrate's nor the district court's order is entirely clear. Both orders contain language that suggests a modification of decision-making responsibility. For

example, the magistrate found that "a modification of decision making is in the best interests of the child" and that "[i]t is not necessary to modify decision making *in any other area* as the parties have been able to reach agreements." (Emphasis added.) And, in adopting the magistrate's order, the district court observed, "The magistrate did not order [father] to vaccinate the minor child; the magistrate modified decision-making ability finding it was *in the best interest of the minor child* to have someone in place to make these decisions for the minor child."

¶ 19 But both orders also suggest that the magistrate did not actually modify decision-making responsibility and, instead, simply broke the impasse by making the decision herself. Nowhere in the magistrate's order does she state that father shall have decision-making authority in this area. To the contrary, the magistrate merely orders that the "[m]inor child may receive [COVID-19] vaccines," and that, if the parents could not agree on the type of vaccine, the child would receive the Pfizer vaccine. Indeed, the magistrate explicitly ordered that the "[p]arties will retain joint decision making on all major decisions surrounding the minor child." For its part, the district court noted father's three

alternative requests and concluded that the magistrate "accepted [father's] second alternative," which was simply to order that the minor child may receive a COVID-19 vaccine and future boosters. Recall that the first alternative father requested was to be allocated medical decision-making while the third was authorization to make the decision for this specific issue — neither of which the magistrate granted.

¶ 20 To the extent the magistrate and the district court considered the order to be a change in decision-making, it appears that they viewed the modification as making *the court* the decision-maker. To the extent that is the case, we note that such a step is both unnecessary and of no effect. A court allocates decision-making authority "between the parties." § 14-10-124(1.5)(b). When parents who share joint decision-making cannot agree on a particular decision, however, the court has authority to break the impasse by making the decision for them. *Thomas*, ¶ 38. In doing so, the court need not — indeed, cannot — take the affirmative step of allocating decision-making authority to itself because it is not a party. *See* § 14-10-124(1.5)(b); *see also Dauwe*, 148 P.3d at 285 (noting that

the division was aware of "no authority that prohibits the court from resolving a dispute between joint decision makers").

¶ 21 Thus, notwithstanding the ambiguous language in both the magistrate's and the district court's orders, we conclude that the magistrate did not modify the allocation of decision-making authority. Instead, when faced with an impasse between joint decision-makers, the magistrate broke the tie herself.

¶ 22 We turn now to whether she did so appropriately.

V. No Endangerment Showing Is Required Before the Court Can Break an Impasse Between Joint Decision-Makers

¶ 23 Mother argues that the court can only break an impasse between joint decision-makers if it finds that the child is endangered. But neither *Dauwe* nor *Thomas* requires such a finding.[1]

¶ 24 In *Dauwe*, the parents could not agree whether their children should be in therapy. 148 P.3d at 285. In resolving this

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[1] Mother's reliance on *In re Marriage of Crouch*, 2021 COA 3, is also misplaced. In *Crouch*, the issue was not what showing was required for the court to break an impasse but, rather, what showing was required to modify the allocation of decision-making responsibility. *Id.* at ¶ 26. The case is therefore inapposite, as we have concluded that the magistrate here did not modify the allocation of decision-making responsibility.

"long-standing dispute," the district court opted not to modify the prior order granting joint decision-making responsibility but ordered that the wife should have the authority to obtain therapy for the children. *Id.* Significantly, the district court entered this order "without finding . . . that retaining the existing allocation of decision-making authority endangered or impaired the children." *Id.* A division of this court upheld that order. *Id.* at 286.

¶ 25 Later, in *Thomas*, the parties disputed whether to send their child to high school in Adams County or Jefferson County. *Thomas*, ¶ 9. Finding that the parties were at a "total impasse" in resolving the school issue, the district court decided the issue for the parties, ordering the child to attend school in Jefferson County. *Id.* at ¶¶ 16, 38. In upholding this decision, the division reasoned that, "when one or both of [the] parents are unable to responsibly discharge their duty to make a particular decision, a court is sometimes left with no alternative but to do so." *Id.* at ¶ 36. The division held that the district court has impasse-breaking authority between two parents with joint decision-making responsibility. *Id.* at ¶ 38. Nowhere in the *Thomas* decision did the division analyze whether the child was endangered. Indeed, the district court had

initially denied the mother's motion to make her the sole educational decision-maker because she had failed to demonstrate that the existing joint decision-making allocation endangered the child. *Id.* at ¶ 12. Notwithstanding this lack of endangerment, after other attempts by the district court to resolve the issue failed, the court simply made the decision itself. *Id.* at ¶¶ 16-17.

¶ 26 Indeed, it makes no sense to require an endangerment finding before a court exercises its impasse-breaking authority. If the court were able to find endangerment, it would not need to make the decision for the parents; the court, instead, could simply modify decision-making authority and make one parent the sole decision-maker. Moreover, if endangerment were required, the inability to break the impasse would effectively grant veto power to a joint decision-maker who prefers the status quo without any consideration of the guiding principle in these cases — the best interests of the child. *See* § 14-10-124(1.5) (charging the court with acting "in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs of the child").

¶ 27 Instead, as *Dauwe* and *Thomas* illustrate, even if there is no endangerment, when there is an impasse between joint decision-makers, the court may break that impasse by making the decision it determines to be in the best interests of the child. *Dauwe*, 148 P.3d at 285; *Thomas*, ¶¶ 17, 38 n.7. Here, the magistrate did just that, and mother does not challenge the magistrate's best interests determination.

¶ 28 Because the magistrate's determination that getting vaccinated was in the child's best interest is supported by the record, we discern no basis for reversal on this ground.[2]

VI. Inadmissible Opinion Testimony

¶ 29 Mother contends that the magistrate erred by allowing Drs. Staat and Dickinson to offer expert opinion testimony in the guise of personal knowledge and experience; characterizing Drs. Staat and Dickinson as "non-retained" experts; and finding that Drs. Staat and Dickinson could testify based on their own personal knowledge, experiences, and qualifications. Assuming without

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[2] In light of our resolution of this issue, we need not determine whether the magistrate's specific endangerment finding has record support, because the finding was unnecessary.

deciding that the magistrate erred in these respects, any errors are harmless.

¶ 30 We review evidentiary rulings in civil cases for harmless error. *Bernache v. Brown*, 2020 COA 106, ¶ 26. If an error "does not affect the substantial rights of the parties," we must disregard it. C.R.C.P. 61; *see* C.A.R. 35(c). An error affects a substantial right only if it substantially influenced the outcome of the case or impaired the basic fairness of the trial. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010). We will reverse only if an error resulted in substantial prejudice to a party. *In re Mendy Brockman Disability Tr.*, 2022 COA 75, ¶ 45.

¶ 31 No substantial prejudice occurred here. In her order, the magistrate wrote, "While the doctors and experts presented all make a reasonable argument for their positions, the [CDC] is the authority in this matter." Thus, the magistrate's order clearly reflects that she did not rely on the testimony of Dr. Staat or Dr. Dickinson. Notably, mother's witness, Dr. McCullough, testified that the CDC made the recommendation that children receive the COVID-19 vaccine, so the order is not without record support. *See Sheehan*, ¶ 22; *Van Gundy*, ¶ 12. Consequently, we can say with

fair assurance that any errors in allowing Drs. Staat and Dickinson to testify did not substantially influence the magistrate's decision. *See Bly*, 241 P.3d at 535. We therefore disregard the alleged errors.

VII. Disposition

¶ 32 The order is affirmed.

JUDGE LIPINSKY and JUDGE GROVE concur.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Mary Elizabeth Childs,
Objector,

v.

Lori Gimelshteyn and Erin Lee,
Proponents of Initiative 2023-2024 #142.

NOTICE OF SUPPLEMENTAL AUTHORITY TO MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142

Through their legal counsel, Mary Elizabeth Childs, registered elector of Douglas County, hereby files this notice of supplemental authority to motion for rehearing on Initiative 2023-2024 #142.

Please take notice of the attached supplemental authority which highlights the single subject and clear title issues identified in the motion for rehearing.

Respectfully submitted this 16th day of February, 2024.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **NOTICE OF SUPPLEMENTAL AUTHORITY TO MOTION FOR REHEARING ON INITIATIVE 2023-2024 #142** was sent this day, the 16th day of February, 2024, via first-class mail, postage paid to:

Lori Gimelshteyn
26463 East Caley Drive
Aurora, CO 80016

Erin Lee
6787 Hayfield St.
Wellington, CO 80549

s/ Erin Mohr
Erin Mohr

Members of the Colorado Title Board
Wednesday, February 21, 2024
Remarks in response to Initiative #142

To the members of the Colorado Title Board:

My name is MB Childs and I am submitting remarks for the record on the concerns I have regarding single subject in initiative #142. As a parent, I am concerned about the overarching impact of this initiative and the language used in it.

My initial objective is that Initiative #142 uses broad language to list a plethora of "public school representatives" in a minor's life that are required to report on a very ambiguous - and private- subject- gender and gender expression.The definition of "public school representative" is so broad, in fact, that parents, kids, volunteers or contractors that see a child for one day will be forced to act as informants whenever they learn of someone's gender dysphoria – the historical analogies abound, and the practical impact is horrifying.

This measure is categorizing all of these "representatives" together as one, but they are medical, academic, or otherwise involved. Representatives who contribute to the school in different capacities and impact a student's life differently. Therefore, this measure is not single-subject based on this language alone.

Furthermore, the broad definition of "public school" means that #142 will cover virtually all schools, including private schools – something that would almost certainly stun voters who think they're addressing only what happens in schools run by local school boards.

Last, and most important to me as the parent of a trangender minor, is the definition of "gender incongruence." Not only does it combine gender and gender expression together when they may be different to everyone, it leans heavily on someone's perception as the word "PERCEIVED" is used more than once. Sex is what is assigned at birth, gender is how someone identifies and gender expression is how they present to the outside world. How someone identifies in their gender is a very personal journey and decision a person makes and they get to choose how that is shared with the world.

Because gender expression is how someone shows up in the outside world, that can be anywhere from the clothes they wear to the haircut they have to the color they love. This initiative doesn't draw a clear distinction between these, forcing students, teachers, parents, volunteers, etc. to make assumptions about a young person based on how they look and rumors they hear, and then report it. The result is censoring students and teachers and restricting an environment that's supposed to be safe for them to learn and explore who they are.

In my family, where there are two cisgender and one transgender minors, this might mean reporting on more than one of my children for any number of reasons. One of my children loves brown and another loves pink. One keeps short hair and another very long. None of these factors is a determination of how they view their gender or express it, but may be PERCEIVED that way and activate a report. Not only is this invasive, it would be based on one person's perception of my child, not on actual facts.

Censoring students and placing ambiguous responsibility on the already overburdened supports for our minor children is no disguise for the underlying nature of this measure. The true intent of this measure is to limit young people's

privacy to learn about and understand their gender and sexuality on their own and come out to their parents, families, and community when they are ready.

Thank you for your time.

MB Childs
Graduate School of Social Work - University of Denver
Douglas County, Colorado

Initiative 142

Legislative Council Staff

Nonpartisan Services for Colorado's Legislature

Fiscal Summary

Date: February 5, 2024 **Fiscal Analyst:** Anna Gerstle (303-866-4375)

LCS TITLE: PARENTAL NOTIFICATION OF GENDER INCONGRUENCE

Fiscal Summary of Initiative 142

This fiscal summary, prepared by the nonpartisan Director of Research of the Legislative Council, contains a preliminary assessment of the measure's fiscal impact. A full fiscal impact statement for this initiative is or will be available at **leg.colorado.gov/bluebook**. This fiscal summary identifies the following impact.

State and local government spending. The measure requires that any public school representative who obtains information that a child in the public school is experiencing gender incongruence must notify the child's parents within 48 hours or receiving the information. The measure may increase workload for school districts to establish policies and guidance for parental notification, and for the state to provide technical assistance to preschools, school districts and charter schools. The exact impacts cannot be estimated, as they will depend on the number of notifications and individuals experiencing gender incongruence statewide and in each school district.

Economic impacts. Overall, the measure is not expected to have a direct economic impact on the state.