BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Mary Brownell, Rogena Sue Johnson, and Mary Beth Childs,
Objectors,

v.

Lori Gimelshteyn and Erin Lee,
Proponents of Initiative 2023-2024 #206.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #206

Through their legal counsel, Mary Brownell and Rogena Sue Johnson, registered electors of Larimer County, and Mary Beth Childs, registered elector of Denver County, hereby file this motion for rehearing on Initiative 2023-2024 #206.

On April 3, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #206:

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

Shall there be a change to the Colorado Revised Statutes concerning a parent's right to review public school records and any materials their child had access to, and, in connection therewith, defining "public school records" to include any and all records related to the child and instructional materials the child has access to in the public school library, an online resource curated for the school, in the classroom, or at any extracurricular event that the child has access to; requiring the records to be made available within 3 days after submitting a request to the school; and defining "public school" to mean any preschool through secondary school that receives state or federal funds?

Violations of the Single Subject Requirement

I. The measure requires public schools to obtain and make available materials that do not belong to the district or school so long as a child "has access to" them.

This measure does not limit its reach to records created, controlled, or maintained by a public school. Rather the right to inspect applies to "any and all records" the "child has access to in a public school library, in a public school classroom, or any school or student sponsored extracurricular event to which the child has access." That certainly covers materials used by a teacher or coach, but it also covers materials brought into school by volunteers and by students. Consider, for example,

- A parent who shares a PowerPoint or video on a career day, or who comes to provide a lecture on a topic being taught in class;
- A parent who brings in a storybook to read to a kindergarten class;
- A student who presents a book report or reads a poem they wrote;
- Students who present during the science fair;
- Students who participate in an after school club;
- Volunteer coaches of after school academic teams who bring in notes.

All these materials are "public school records" to which the student has access in class or an activity. None of these materials are currently covered by CORA or any other state public records law. This measure thus not only changes disclosure requirements for materials currently covered by open records laws (school records to which CORA would apply), it creates an entirely new class of materials that are now subject to a public disclosure law.

In fact, because a document becomes a "public school record" if a child merely has access to it as part of a "*student sponsored* extracurricular event," any document in a child's house where students meet to, for instance, rehearse for a musical performance or practice for a chess tournament can be accessed by one of the participants' parents. Initiative #206 contains no requirement that the extracurricular event happen at a school or even be sanctioned by a school. It is enough that it is "student sponsored." Now, documents – writings, magazines, recordings, and the like – are subject to mandatory disclosure because they were in the vicinity of a child and she had access to it. Notably, this definition does not even require that the child saw or used the document.

This expansion violates the single subject requirement. In 2014, the Supreme Court ruled that changing certain requirements of recall laws as to elected public officials and then also broadening the right of recall to include non-elected government officials was a violation of the single subject requirement. "Voters would be surprised to learn that, in voting for the new article XXI's revamped procedures for recall petitions and elections, they are also authorizing the recall firing, at any time, of—for example—the appointed heads of Colorado's state executive departments, their appointed city or county manager, or the appointed head of their local library." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶33, 333 P.3d 76, 85. In the same way, votes would be shocked to learn that any document within a student's reach in private buildings and homes is covered by this measure.

Initiative #206 changes certain disclosure parameters for school employees but also expands records subject to disclosure to reach persons who have no job-related role with a school at all. Just as voters had no reason to think that an expansion of the recall process included the recall of public library officials, they would be surprised that a volunteer at their school library who offers "recommended reading materials" to students or a student who presents at a science fair will have their property become subject to disclosure. The same is true for volunteers who give a classroom presentation about what they do for a living, address a school assembly, assist in an elementary classroom's math group, read books to students, or help coach an academic team connected with a course taught at that school.

The broad realm of documents to be covered by this provision includes those that are used by the volunteer whether or not they are physically transferred to the school or the district, such as the library volunteer's reading list or a speaker's background notes. They are "public school records" even though they are solely in the possession of the volunteer, simply because a child "has access to" them. Thus, it is the individual volunteer, not the public entity or its custodian of records, who would be required to produce the documents from those materials that he or she possesses and used in a school presentation.

Private individuals (and the records they create that are not in the possession of a "public school") are not covered by or subject to public records laws such as CORA. Even a government official's personal papers aren't typically treated as public records. *See Wicks Comm. Co. v. Montrose Bd. of Cty. Comm'rs*, 81 P.3d 360, 366 (Colo. 2003) ("The inclusion of [work-related] thoughts does not render a personal paper a public record for the purposes of CORA"). Initiative #206 changes that. Such an expansion is truly an aspect that is "hidden in the folds" of Initiative #206.

This hidden aspect is problematic generally, but particularly when considered in light of the definition of "public school," which includes ***private schools***. Thus parents, volunteers, clergy, and students in private school settings are going to be subject to a public records disclosure law. No voter is going to understand the scope of what they are being asked to approve in #206.

II. Initiative #206's requirement for disclosure of "any and all records related to a student" is an undefined, intentionally vague reference that sets no limits and provides no clarity for voters.

The title's single subject statement acknowledges that divulging these records is different than learning about a class curriculum or getting access to a teacher's lecture notes. The title states that this measure's single subject is "a parent's right to review public school records ***and*** any materials their child had access to." If the array of "records" wasn't distinct from instructional materials, there would be no need for "and" in this portion of the title. Neither would there be a need to set forth the entire "public school records" definition in the title that also needs "and" between "any and all records" and "instructional materials." But that need exists and is telling on this question.

As a result, the measure is designed to allow Proponents to appeal to different constituencies with potentially inconsistent interests to get to 50% +1.

- Think your child is reading objectionable novels thanks to her slightly subversive AP English teacher?
- Curious whether your child is experiencing gender identity issues and has talked to a social worker?
- Want to know if your child is divulging information about his or her home life to a school counselor?
- Wondering if your child is getting information about birth control from the school nurse?
- Concerned your kid isn't where they should be on the coach's depth chart?

All of these types of voters with inconsistent interests will be told that this measure answers whatever troubles them about schools. This measure is a classic case of logrolling. It violates the single subject requirement as a result.

III. Besides authorizing parental access to records, Initiative #206 limits the authority of school boards to exercise authority over the schools of their districts and limits the authority of school administrators to exercise control over their schools.

Under Colorado's education system, the Constitution enshrines a system of local control, in which "the framers made the choice to place control 'as near the people as possible' by creating a representative government in miniature to govern instruction." *Owens v. Colo. Cong. of Parents*, 92 P.3d 933, 939 (Colo. 2004); *see* Colo. Const. art. IX, sec. 15-16. Initiative #206 does not simply create a "right of inspection" for parents, it also displaces the authority of school boards and administrators over their schools.

The measure allows a parent to make a records demand by "submitting a written request to the public school representative." (Proposed C.R.S. § 22-1-144(3).) The definition of "public school representative" is "***any*** public school administrator, teacher, nurse, counselor, social worker, or coach who ***is working in*** a public school." (*Id.* § 22-1-144(2)(e) (emphasis added).)

Given the use of "any" in the definition of "public school representative," there is no requirement that the records demand be made upon the child's teacher or principal—or, in fact, on someone who works in the child's school. If Proponents had sought to limit this measure, they simply would have drafted the definition to apply to a school staff member "who is working *in the child's* public school" instead of "a public school. To achieve this end, they made just such a change to Initiative #205, specifying that a public school representative must report certain information about "a child enrolled in the public school at which they work."[1] But as to #206, they didn't.

Neither did they require that the "public school representative" have immediate access to or act as the custodian of such documents. As a result, it is no more unlikely that a parent seeking access from a teacher could, in compliance with #206, deliver a demand for records on the child's math teacher or basketball coach than it is that a parent could serve the demand on a friendly administrator or counselor in another school or even in another district—or even on a private school employee that, because of its receipt of state or federal funds, is deemed to work at a "public school."

Thus, the measure allows for a form of "judge shopping" such that the demands can be delivered to "any" person in any district in any school that qualifies as a public school. This alters the authority vested in school boards and school personnel to control instruction in public schools, *see* Colo. Const., art. IX, sec. 15, and, as doing so is not necessarily or properly connected to the measure's subject, it violates the single subject requirement.

---

[1] *See* 2023-2024 #205, Proposed C.R.S. § 22-1-144(3), *available at* https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/205Final.pdf.

IV. Initiative #206 makes every school that receives "state or federal funds" a public school, meaning that private schools will be subject to this disclosure requirement.

This measure purports to apply only to "public schools." But it has much broader application than that. "Public school" is defined to mean "any preschool, primary, or secondary school that receives state or federal funds." (Proposed C.R.S. § 22-1-144(1)(c).) Many religious and private educational institutions providing services to pre-college students accept state or federal funds.

For instance, the universal preschool program in Colorado uses and funds private providers, specifically all "Home, Center Based, Private, and Faith Based Providers." *See* https://drive.google.com/file/d/1tmgMu9cxqKqpviYWjIah0S7yvKnq22JV/view at 6 (last viewed April 8, 2024); *see also* C.R.S. § 26.5-4-203(14)(a), (b), (defining "preschool provider" to include family child care home and child care center). "The Department of [Education's] Early Childhood's Universal Preschool (UPK) Colorado program allows families to choose the right setting for their child, whether it is in a licensed community-based, school-based or home-based setting." https://upk.colorado.gov/searches/976330cd-4c2d-42ec-a167-0090f86ccb04 (last viewed April 10, 2024). For private preschool programs, there is a 25-page contract allowing them to access state funds in return for the provision of an agreed upon level of educational services. https://docs.google.com/document/d/1G5LJyJZT4tF-MZ46FxAYujjKXctrm3kX90xseXzNPCU/edit?userstoinvite=lynda.jenson@gmail.com&sharingaction=manageaccess&role (Exhibit A) (last viewed April 8, 2024). There can be no question that private institutions and companies are, under #206's definition, "public schools."

In addition, according to the Colorado Department of Education, there are more than ten (10) programs of federal funding that are offered to private schools in Colorado through the No Child Left Behind Act of 2001 ("NCLB").

> The programs for which Private School children and teachers may be eligible as stated in Section 9501(b) of NCLB are:
>
> Title I, Part A – Improving the Academic Achievement of the Disadvantaged
> Title I, Part B – Reading First and Even Start
> Title I, Part C – Migrant Education
> Title II, Part A – Preparing, Training and Recruiting High Quality Teachers and Principals
> Title II, Part B – Preparing Tomorrow's Teachers to use Technology
> Title II, Part D – Enhancing Education Through Technology
> Title III, Part A – Language Instruction for Limited English Proficient and Immigrant Students
> Title IV, Part A – Safe and Drug-Free Schools and Communities
> Title IV, Part B – Rural and Low-Income School Programs
> Title V, Part A – Innovative Programs
> Title V, Part D – Gifted and Talented Students

See https://www.cde.state.co.us/choice/nonpublic_programs (last viewed April 8, 2024). And various other programs end up putting money into private schools, one example of which is the program that provided federal funds during the pandemic. *See* https://www.denver7.com/news/investigations/colorado-private-schools-publicly-funded-charter-schools-get-millions-in-coronavirus-ppp-loans (last viewed April 8, 2024). Private schools accepting any of these programs' federal funds become, under this definition, "public schools."

The portrayal of this record disclosure requirement as being limited to "public schools" is substantively wrong. It is a surreptitious change in that law that is coiled in the folds of this measure. As such, it is an additional subject that violates Art. V., sec. 1(5.5) of the Constitution.

V. Initiative #206 requires "any public school… nurse, counselor, [or] social worker… working in a public school" to breach confidentiality, as disclosure of "any and all records related to the parent's child" includes these professionals' communications with students.

Initiative #206 requires disclosure of two types of records. First, parents will have unfettered access to "any and all records related to the parent's child." (Proposed C.R.S. § 22-1-144(2)(d).) Second, they will have access to "instructional materials the child has access to in a public school." *Id*. It is a mistake to read "any and all records" as being limited to instructional materials as there is no reason to have a duplicate reference to the same set of school documents. *Colo. State Bd. of Accountancy v. Raisch*, 931 P.2d 498, 500 (Colo. App. 1996), *aff'd*, 960 P.2d 102 (Colo. 1998) ("any" is an all-inclusive term used synonymously with the terms "every" and "all").

As a general matter, nurses, counselors, and social workers who provide health care or mental health services all receive information, subject to privilege that protects the confidentiality of these communications. C.R.S. § 13-90-117(1)(d), (g). This privilege protects interchanges which take place so that a person may seek treatment. *B.B. v. People*, 785 P.2d 132 (Colo. 1990).

As to the guaranteed privacy of these communications, licensed school social workers and counselors (covered professionals under #206) must preserve the confidentiality of matters communicated to them. *See* C.R.S. § 12-245-216(1)(d)(IV). Authorized persons (such as a school nurse) can provide medically acceptable contraceptive information to minors enrolled in public schools. C.R.S. § 25-6-102(8). Records of these communications will be available to parents and no longer confidential if #206 is adopted.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #206 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution.

Respectfully submitted this 10th day of April, 2024.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin
Mark Grueskin
Nathan Bruggeman
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rklawpc.com
nate@rklawpc.com

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #206** was sent this day, the 10th day of April, 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