NO. 83024-0

SUPREME COURT OF THE STATE OF WASHINGTON

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

BRIEF OF *AMICI CURIAE* TEAMCHILD, COMMITTEE FOR INDIGENT REPRESENTATION AND CIVIL LEGAL EQUALITY, AND CHILDREN AND FAMILY JUSTICE CENTER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

FEDERAL CASES

OTHER JURISDICTIONS

CONSTITUTIONAL PROVISION

STATUTES

FEDERAL STATUTES

STATE STATUTES

WASHINGTON ADMINISTRATIVE CODE

OTHER AUTHORITIES

I. SUMMARY OF THE ARGUMENT

The unanimous three-judge Court of Appeals panel correctly decided that due process requires appointment of counsel for children in truancy proceedings. *Amici* TeamChild, Committee for Indigent Representation and Civil Legal Equality (CIRCLE), and the Children and Family Justice Center (CFJC) agree with E.S., and other *amici* that the Court of Appeals decision should be affirmed. In this brief, TeamChild, CIRCLE, and CFJC write to emphasize the ways in which a child's right to education is at stake in truancy proceedings, and to argue that children without counsel in truancy proceedings are denied a meaningful opportunity to be heard. Although this brief focuses on a child's educational interests in a truancy proceeding, *Amici* agree that the liberty and privacy interests at stake in truancy proceedings provide additional bases for appointing counsel in state-initiated adversarial proceedings against a child. When considered together, these three interests compound to make the basis for a right to appointed counsel even stronger.

II. IDENTITY AND INTEREST OF AMICI

The identity and interest of *Amici* in the current matter is set forth in *Amici's* Motion for Leave to File *Amici Curiae* Brief.

III. STATEMENT OF THE CASE

Amici adopt E.S.'s and the ACLU's statements of the case.

IV. ARGUMENT

A. A CHILD NEEDS COUNSEL IN TRUANCY PROCEEDINGS TO PROTECT HER RIGHT TO AN EDUCATION.

A child's right to public education may be the most important right she holds. This right is at stake in multiple ways in a truancy proceeding.

1. Education is Both a Critically Important Interest and a Paramount Constitutional Right for Children in Washington.

The U.S. Supreme Court explained in *Brown v. Board of Education*, "[I]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). There is no question that a child's right to an education is a critically important interest. [1] Even short-term disruptions to a child's education trigger the demands of due process under the federal constitution. *See Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975) (children have a right to due process, even in the context of a suspension for a single day).

In Washington, a child's right to an education is a paramount constitutional right. *See* Const. Art. IX, §1; *see also Seattle School District v. State*, 90 Wn.2d 476, 501, fn. 13, 585 P.2d 71 (1978)("all resident children have an absolute right to an education, and that right is

[1] Under the federal procedural due process standard, the first factor courts consider when evaluating whether a particular procedural safeguard is constitutionally required is the interest at stake. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 729, 47 L.Ed.2d 18 (1976).

constitutionally paramount"). This Court has held previously that when a fundamental constitutional right is threatened by state action, a right to counsel exists. *See In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974); *In re Myricks*, 85 Wn.2d 252, 255, 533 P.2d 841 (1975).

2. The Court of Appeals Correctly Decided that a Child's Right to Education is at Stake in Truancy Proceedings.

The District argues that the only interest implicated in this matter is E.S.'s "desire not to ... attend school." Petitioner's Supplemental Brief, at 15. This position reflects a fundamental misunderstanding of the interests at stake in a truancy hearing.

a. Children face immediate, potentially harmful changes to their educational programs in truancy fact-findings.

Courts have the authority to change a child's school placement or order enrollment in an alternative school after a truancy fact finding. RCW 28A.225.090(1)(b),(c). As the Court of Appeals recognized, "a misguided decision could disrupt the child's education by introducing or exacerbating stigma, uncertainty, and instability, or by placing the child where needed services are not available." *Bellevue Sch. Dist. v. E.S.*, 148 Wn. App. 205, 216, 199 P.3d 1010 (2009).

In TeamChild's experience advocating for youth, such transfers can, indeed, make matters worse for students. TeamChild attorneys have

represented students who, before they obtained counsel, were ordered to attend an alternative school, only to find out that the alternative school had a waiting list and the child would not start for months; or that classes were for only a few hours each week; or where the alternative school was for students with discipline issues, stigmatizing and further alienating the child with attendance problems.[2]

A change in school placement by a well-meaning juvenile court judge can also jeopardize other important state and federal education rights. Under the Individuals with Disabilities Education Improvement Act (IDEIA), placement decisions concerning students with learning, mental health, and other disabilities[3] may be made only by a multidisciplinary team that includes the child's parents, education experts, and other school staff knowledgeable about both the child and available appropriate community resources. *See* 20 U.S.C. §1414. Homeless

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[2] Placement in an inappropriate alternative school environment may not only be stigmatizing and alienating, it may also be unsafe. Alternative schools for children with truancy and discipline problems have come under fire for having low academic standards and poor school climates. A recent independent review of a Seattle alternative school reported "the school climate is not physically or emotionally healthy for students." Jessica Blanchard, *Report Cites Major Problems at Marshall,* SEATTLE POST-INTELLIGENCER, B2, April 4, 2007.

[3] Learning problems and disabilities are common among children with attendance problems. *See* Tonisha Jones, *Truancy: Review of Research Literature on School Avoidance Behavior and Promising Educational Reengagement Programs*, Models for Change, (2009) at 15; *see infra* Section B.1.

children, who are particularly at risk for truancy,[4] have important educational rights regarding placement under the McKinney Act. *See* 42 U.S.C. §11431 *et seq*. Students who are English language learners have rights regarding bilingual education. *See* RCW 28A.180.010 *et seq*. But because the child is likely not aware of these rights, and has no counsel to assert them, there is a significant risk that a child's educational rights will be unintentionally impeded by a truancy court order changing her placement.

The District argues that being ordered to change school programs is not important enough to merit counsel because students are not entitled to counsel in school disciplinary hearings. *See* Petitioner's Supplemental Brief at 18-19. This argument fails for two reasons. First, school discipline proceedings are informal administrative proceedings, not adversarial judicial proceedings in Superior Court. *See* WAC 392-400.[5] Truancy proceedings take place not in a school district office, but rather "in the strange and awesome setting of the juvenile court." *Myricks*, 85 Wn.2d at 254. Second, the U.S. Supreme Court has never addressed the question of whether appointed counsel is required in the context of long-

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[4] *See* Lynda Richardson, *Walls of Shame Keep Homeless from School*, NEW YORK TIMES, January 2, 1992.

[5] In spite of the informal nature of school discipline hearings, students have a complex array of rights against school discipline, including notably, the right to be represented by counsel. *See e.g.* WAC 392-400-270(1)(b).

term suspension or expulsion. *Goss v. Lopez* considered only the minimum procedures required in short-term suspensions; the Court specifically noted that longer term suspensions would require more significant procedural protections. *See Goss*, 419 U.S. at 584.

b. Failing to address the underlying causes of a child's truancy impairs the child's right to education.

The underlying reasons for a child's truancy are often numerous and complex. Domestic violence, poverty, substance abuse, and mental health issues are all correlates of truancy.[6] However, school climate issues, teacher attitudes and the way schools provide educational services are also important factors.[7] A recent study in Seattle noted that the main problem identified by parents and students in a truancy program was that "school isn't working for them" and that "kids feel marginalized."[8] According to the evaluation, simply telling kids to "buck up and go back to class" is not a solution when kids need more help to reengage with school.[9] Research indicates that the most effective way to address truancy

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[6] Tonisha Jones, *supra* note 3, at 4.
[7] *See* Myriam Baker et al., *Truancy Reduction: Keeping Kids in School*, OJJDP Bulletin, September 2001, available at http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf.
[8] *See The Story Behind the Numbers: A Qualitative Evaluation of the Seattle WA Truancy Reduction Demonstration Program*, National Center for School Engagement (2007), available at http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/TheStoryBehindtheNumbersAQualitativeStudyoftheSeattleWATruancyReductionDemonstrationProgram.pdf.
[9] *See id.*

is by addressing these underlying factors, rather than simply referring the child to court.[10]

Recognizing the importance of intervention, Washington law requires school districts to meet with students and parents, analyze the causes of the nonattendance, and then take steps to eliminate or reduce the child's absences *prior* to filing a truancy petition. *See* RCW 28A.225.020.[11] Without counsel, however, these critical services are rarely addressed prior to a truancy finding.[12] Districts, and even courts, often misunderstand the obligation to provide interventions prior to filing a truancy petition. In TeamChild's experience, many districts believe they

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[10] Research on truancy prevention across the country supports the idea that school based intervention programs are the key to reducing truancy. *See e.g.* Joyce Epstein and Steve Shelden, *Present and Accounted For: Improving Student Attendance through Family and Community Involvement*, Journal of Educational Research (2002); Tonisha Jones, *supra* note 3, at 9.

[11] The statute provides a nonexhaustive list of possible interventions including:

> adjusting the child's school program or school or course assignment, providing more individualized or remedial instruction, providing appropriate vocational courses or work experience, referring the child to a community truancy board, if available, requiring the child to attend an alternative school or program, or assisting the parent or child to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school.

RCW § 28A.225.020(1)(c).

[12] The lack of interventions for E.S. is a good example of this problem. In a list of 23 possible interventions in E.S.'s truancy petition, only one box was checked (tutoring) and availability of even that intervention was disputed. C.P. 2. The District also asked for permission to bypass a key intervention- the community truancy board. C.P. 13. This is not unusual. In a recent study, only 29% of districts had intervention programs targeting students at risk for truancy. *See* Tali Klima et al, *Truancy and Dropout Programs: Interventions by Washington School Districts and Community Collaborations*, Washington State Institute for Public Policy, (2009). Schools acknowledge that students who have missed a significant amount of school are often unsupported at school, and parents are often uninformed about the problems. *See id.*

must file a petition upon a certain number of missed school days, even if no meaningful interventions have been tried first. Or, districts argue the statutorily-required letters providing notice of the child's absences and meetings with the family constitute the interventions, in spite of clear statutory language to the contrary.[13]

Furthermore, children and parents are generally unaware of the school's requirement to undertake pre-filing interventions, or of the relevance of other state and federal educational rights. *See Bellevue School Dist. v. E.S.*, 148 Wn. App. 205, 217, 199 P.3d 1010 (2009). School notices, like the notices sent to E.S. in this case, do not mention the student's rights or the district's obligations. C.P. 9-12. Moreover, courts are denied the opportunity to enforce the pre-filing requirements because many children, like E.S., sign agreed orders and unknowingly waive their right to a hearing where the district's efforts, and the child's needs, would be at issue.[14] Even if judges meet the children in court and make an inquiry of district officials, they are rarely able to fully investigate whether

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[13] Under Washington law, the obligation to have meetings with the family and send letters notifying parents of absences is separate from a district's obligation to take steps to eliminate or reduce the truant behavior. *Compare* RCW § 28A.225.020(1)(a-b) *with id.* at (c).

[14] A recent study indicated that as few as 41% of children with truancy petitions ever appear in court because agreed orders are signed. *See* Marna Miller et al, *Washington Truancy Laws in the Juvenile Courts: Wide Variation in Implementation and Costs*, Washington State Institute for Public Policy (2009) at 2.

appropriate interventions were tried.[15] Certainly, neither the child nor the parent is in a good position to assert the child's rights under the truancy statute, or other state or federal laws.[16]

The failure to complete pre-filing interventions is compounded by the fact that once court supervision is in place, the focus shifts to the simple question of whether or not the student is complying with the judge's order to attend school. *Compare* RCW § 28A.225.020 *with* RCW § 28A.225.090. As a result, the opportunity to enforce the child's right to interventions is lost, and availability of counsel at the contempt stage does not repair the loss.[17]

For all of these reasons, the right to interventions to help the child reengage with school is an unfulfilled and meaningless right for unrepresented children in the truancy process. As a result, the most

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[15] As one court has noted in the context of finding a constitutional right to counsel for children in dependency cases, "[j]udges, unlike child advocate attorneys, cannot conduct their own investigations, and are entirely dependent on others to provide them with information about the child's circumstances." *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp.2d 1353, 1361 (N.D. Ga. 2005).

[16] Unfortunately, the parent may even be an opposing party, with different interests than the child in a truancy proceeding. The parent faces her own penalties, causing a divergence of interests with the child. *See* RCW 28A.225.090.

[17] This reality is especially troubling because of its implication for a child's potential incarceration. A child's inability to collaterally attack the underlying truancy order means the denial of counsel increases the likelihood of future incarceration. *See Bellevue School Dist*, 148 Wn. App. at 213.

effective ways to help the child reengage with school may be permanently lost, to the significant detriment of the child and community.[18]

B. REQUIRING CHILDREN TO GO UNREPRESENTED IN TRUANCY PROCEEDINGS DENIES THEM A MEANINGFUL OPPORTUNITY TO BE HEARD.

The risk of error in truancy proceedings is unacceptably high because children are fundamentally less capable of representing themselves than adults. The paucity of procedural safeguards available to children in truancy proceedings compounds the risk. Appointing counsel, on the other hand, ameliorates the risk, and helps fulfill the intent of the truancy statute.

1. Children are presumptively incapable of defending themselves against accusations by the state in a truancy fact- finding.

It is well accepted that there are important developmental differences between children and adults that impact their respective abilities to proceed without counsel.[19] As the Court of Appeals recognized, children "lack the experience, judgment, knowledge, and resources to effectively assert their rights." *Bellevue School Dist. v. E.S.*,

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[18] *See* John Bridgeland et al, *The Silent Epidemic: Perspectives of High School Dropouts*, The Bill and Melinda Gates Foundation (2006)(linking attendance problems with eventual drop out, arguing for improving school-based supports for children who are struggling in school, and discussing the incredible social costs associated with high dropout rates).

[19] Developmental differences between children and adults were a critical factor in the U.S. Supreme Court's recent decision to abolish the death penalty for juveniles. *See Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005).

148 Wn. App. 205, 214, 199 P.3d 1010 (2009) (*citing DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998). Children cannot sign legally binding contracts, bring lawsuits, or even retain a lawyer to represent them in a truancy proceeding.[20] Children under 12 are presumed incapable of committing a crime in Washington. *See* RCW 9A.04.050.

Children in truancy proceedings are at a particular disadvantage. It is well recognized that children who demonstrate truant behavior often struggle with a "perfect storm" of social and educational challenges. They are as young as eight years old,[21] come from predominantly low-income families, and may struggle with, or have family histories of, substance abuse and mental health issues.[22] They often have significant learning delays and disabilities. A recent evaluation of a Tacoma truancy program found that more than one-third of children had disabilities requiring special education services.[23] Students with special education needs often

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[20] *See Bellevue School Dist.*, 148 Wn. App. at 214-15.
[21] *See* RCW 28A.225.010.
[22] *See* Myriam Baker et al., *Truancy Reduction: Keeping Kids in School*, OJJDP Bulletin, September 2001, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/188947.pdf.; Tonisha Jones, *supra* note 3.
[23] *See Reengaging Youth in School: Evaluation of the Truancy Reduction Demonstration Program*, National Center for School Engagement, August 10, 2006. Available at: http://www.schoolengagement.org/TruancypreventionRegistry/Admin/Resources/Resources/TheStoryBehindtheNumbersAQualitativeStudyoftheSeattleWATruancyReductionDemonstrationProgram.pdf. One quarter of children in the Seattle truancy reduction program were eligible for special education. *See id.* It seems reasonable to assume that the number is even higher when one considers students with disabilities who have not yet

have very low reading skills, communication disorders, or even significant cognitive delays. Asking children with these kinds of vulnerabilities to proceed without counsel in any kind of judicial proceeding is profoundly unfair, especially a proceeding that is only one step away from incarceration.[24]

The particular vulnerability of children in the truancy process also underscores the dramatic imbalance of power in truancy proceedings, one of the key factors regarding appointment of counsel in non-criminal cases in Washington. *See Myricks*, 85 Wn.2d. at 255. Children, in spite of their youth, inexperience, and unfamiliarity with the court process and rules of evidence, are required to introduce evidence, challenge inadmissible evidence, present and cross examine witnesses, and assert legal defenses against district officials or even county prosecutors who routinely conduct truancy fact-findings. Moreover, the school district officials have access to lawyers paid by the state to represent their interests. Given such a gross imbalance of power, it is not surprising that children and families sign a

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been identified as eligible for special education, as well as students who have disabilities but do not qualify for special education.

[24] The high rate of disability among children in truancy proceedings also makes the hearings more legally complex because the hearings may also implicate rights under state and federal special education laws. *See supra* section A.2.

high percentage of agreed orders[25] and avoid being placed in such an untenable position.

Counterintuitively, the District asserts that the child's relative lack of capacity and increased vulnerability actually *decrease* the alleged truant's need for counsel. This argument inverts the traditional approach for evaluating procedural due process rights, in which courts demand that the requisite procedures be tailored to the capacities and circumstances of those who are to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

2. *Lassiter* does not Prevent Appointment of Counsel for E.S.

In *Lassiter v. Department of Social Services of Durham County*, the U.S. Supreme Court decided that a case-by-case assessment is necessary to determine whether parents are entitled to counsel when threatened with termination of their parental rights. 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). *Lassiter* imposed a "presumption" against appointment of counsel in cases where physical liberty is not at stake, and applied the presumption after the balancing of interests required under *Mathews*. *See id.* But both *Mathews* and *Lassiter* involved adult litigants, and neither made mention of the different legal and factual capacities of children and adults. Nor did they address the particular vulnerabilities of

[25] *See* Klima *et al.*, *supra* note 14.

children with educational problems. Even if one assumes *Lassiter* meant to impose a presumption against the appointment of counsel for children, the differences between child and adult litigants overcome any such presumption.

Furthermore, it is worth noting that Washington does not follow the *Lassiter* rule of determining on a case-by-case basis whether counsel is required in dependency cases.[26] *Luscier/Myricks* created an unqualified right to counsel in such cases, and focused the constitutional inquiry in Washington on the nature of the interests at stake, and the relative powers of the antagonists.[27] *See Myricks*, 85 Wn.2d at 254. In so holding, this Court expressed special concern about state-filed adversarial proceedings

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[26] *See In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974); RCW 13.34.070. It is also worth noting that *Lassiter* and its "presumption" have been widely rejected by other state legislatures and courts. The vast majority of states, like Washington, provide a right to counsel in termination of parental rights proceedings. *See* Bruce Boyer, *Justice, Access to the Courts, and the right to Free Counsel for Indigent Parents: the Continued Scourge of Lassiter v. Department of Social Services*, 15 TEMP. POL. & CIV. RTS L. REV. 635 (2007). *Lassiter's* presumption has been criticized as "rest[ing] on a dubious reading of precedent." Barbara Shulman, *The Supreme Court's Mandate for Proof Beyond a Preponderance of the Evidence in Termination of Parental Rights*, 73 J. CRIM. L. & CRIMINOLOGY 1595 (1982)(quoting *The Supreme Court, 1980 Term, Lassiter v. Department of Social Services*, 95 HARV. L. REV. 93, 138 (1981). Alaska and California have both rejected *Lassiter* under their state constitutions. *See In re K.L.J.*, 813 P.2d 276 (Ak. 1991); *In re Jay R.*, 150 Cal. App. 3d 251 (Cal. Ct. App. 1983). Justice Blackmun, in his dissent in *Lassiter*, wrote that the presumption was "not only illogical, but also marks a sharp departure from the due process analysis consistently applied heretofore." *Lassiter*, 452 U.S. at 49.

[27] There is no doubt that even if *Lassiter* may have eroded the federal due process underpinnings of *Myricks/Luscier,* these decisions and their analyses are still binding precedent for constitutional analysis in Washington. Post-*Lassiter* cases have reiterated their continuing precedential value. *See In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995)(holding that a right to appointed counsel applies when fundamental rights are at stake); *King v. King*, 162 Wn.2d 378, and fn.3, 383-84, 174 P.3d 659 (2007)(referring to the *Myricks/Luscier* approach to appointment of counsel).

against vulnerable respondents. *See id.* (Explaining that "[t]he full panoply of the traditional weapons of the state are trained on the defendant-parent, who often lacks formal education[.]"). Appointing counsel in truancy proceedings is fully consistent with these concerns.[28]

Moreover, rather than presuming children are capable to represent themselves, this Court has urged lower courts to strongly consider appointing counsel for children. "When adjudicating the 'best interests of the child' we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless." *In re Parentage of L.B.*, 155 Wn.2d 679, 712, n. 29, 122 P.3d 161 (2005). The Court's recommendation is reinforced by state policy in Washington. Children are appointed counsel in At-Risk-Youth[29] and Child in Need of Services Petitions.[30] Children have a right to request counsel in dependency proceedings after age 12, and have a federal right to

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[28] *King v. King* is not contrary. *See King,* 162 Wn.2d 378, 174. P.3d 659 (2007). *King* did not involve the state as a party, nor a child respondent.

[29] *See* RCW 13.32A.192(1)(c)(3). The risk of loss of liberty is identical in at-risk youth proceedings. The District suggests otherwise in its revised brief, arguing that at-risk youth may be apprehended prior to the hearing. *See* Petitioner's Supplemental Brief at 15, fn. 3. But children in truancy proceedings may be arrested and detained for missing a truancy fact finding hearing, leading to detention prior to fact-finding. The failure to appear rate is as high as 30% in truancy proceedings, and bench warrants are frequently issued. *See* Mary Campbell McQueen, *Truancy Case Proceeding Practice*, Washington State Center for Court Research (2004).

[30] *See* RCW 13.32A.160.

representation by a guardian *ad litem*.[31] Children also have a right to counsel in delinquency and civil commitment proceedings.[32] Truancy fact findings are the only kind of court proceeding in Washington where children defend themselves against accusations by the State without counsel.

For all these reasons, even if one were to accept the District's argument that the presumption in *Lassiter* operates to the disadvantage of children in truancy fact-findings, it would still not change the result in this case. The three important interests at stake, the presumptive legal incapacity of children, and the significant imbalance of power between the state and the child, easily overcome any presumption against counsel for children in truancy proceedings.

3. No effective alternative procedural safeguards exist in truancy proceedings.

To understand the lack of procedural safeguards for children in truancy fact findings, it is helpful to view the process from a child's perspective. The first contact the child has with the court is normally in the form of a summons. The notice received by the child typically

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[31] *See* RCW 13.34.100(6); 42 U.S.C. §5106a(b)(2)(A)(xiii). Although this Court has not ruled on the question, every other court to consider it has ruled that children are constitutionally entitled to appointment of counsel in dependency proceedings. *See Kenny A. ex rel. v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005); *Roe v. Conn*, 417 F.Supp. 769 (M.D. Ala. 1976); *In re the Matter of Jamie T.T.*, 191 A.D.2d 132 (N.Y 1993).

[32] *See* RCW 13.40.140 (delinquency); RCW 71.05.300 (civil commitment).

threatens that a warrant will be issued if the child does not attend an upcoming court date, and that she may face incarceration if she is found truant and continues to miss school. In the summons, there is usually no information about the hearing process or the child's rights.

What happens next in the process varies by jurisdiction across the state. In some jurisdictions, the "hearing" is really just a lecture by a probation officer or even prosecutor about the importance of school, and a request to sign an agreed order waiving the right to a hearing without any legal advice.[33] Only if the child refuses to sign the agreed order is she ever given the opportunity to appear before a judge. In other jurisdictions, the child is assigned to a busy truancy calendar at Juvenile Court. In that context as well, a district official asks the child to waive her right to a hearing and sign an agreed order. The one common feature is that the child never has the opportunity to speak with anyone to advise her about her rights.

If the child requests an actual hearing to challenge the allegations, she is forced to proceed "in the strange and awesome setting of the

[33] TeamChild has frequently heard from families about the confusing, sometimes coercive, nature of the truancy process. Clients have reported that truancy officers have come to the child's home, with a police escort, to obtain a child's signature on an agreed order. Another client was suspended when he refused to sign an agreed order without an opportunity to speak with a lawyer about it.

juvenile court"[34] without any legal help. The District argues that truancy hearings are not adversarial, but any accused child would disagree. The child does not know anything about what kind of evidence is admissible, how to offer evidence, or what the legal standards are for a finding of truancy. The child almost certainly does not know that the school's failure to take steps to address the truancy is a valid defense. *See Bellevue School Dist.*, 148 Wn. App. at 217. The hearing, as in E.S.'s case, may be perfunctory. *See id.* Yet the court has the power to change her school program drastically, or order her to continue to attend a school that may have marginalized and alienated her. Moreover, none of the procedural protections mitigating against appointment of counsel in a private custody proceeding, cited in *King v. King*,[35] are present in the truancy context. Instead, the process is characterized by the same procedural informality that the U.S. Supreme Court rejected in the context of juvenile delinquency. *See In re Gault*, 37 U.S. 1, 18-19, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1968).

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[34] *Myricks*, 85 Wn.2d at 254.

[35] 162 Wn.2d 378, 174 P.3d 659 (2007). In *King*, this Court cited safeguards for both parents against erroneous decisions, including: the appointment of an attorney to represent the children's interests at public expense when the parties are indigent (RCW 26.09.110); potential advice of professional personnel regarding parenting plans (RCW 26.09.210); appointment of a guardian ad litem to investigate and prepare a report on custodial arrangements possibly at public expense (RCW 26.09.220, 26.12.175(1)(d)); availability of family court facilitators to assist pro se parents (RCW 26.12.802(3)(d)) and attorney fee shifting when possible to equalize the imbalance of power and resources among the litigants (RCW 26.09.140).

4. Appointing counsel for children in truancy proceedings will improve outcomes for truant children.

Counsel will not only ensure due process, it will also help fulfill the intent of the truancy statute. Counsel can provide a necessary check on whether school based interventions have been exhausted prior to filing truancy petitions, as well as help the child articulate the underlying reasons for her nonattendance. The best source for understanding the reasons for a child's nonattendance is the child herself. But without counsel, it is highly unlikely the child will be comfortable talking about the reasons for her nonattendance in open court.

The District argues that lawyers for children in truancy proceedings will be ethically required to help them avoid attending school. But school attendance is compulsory in Washington, and the vast majority of children want to go to school. The real work of a lawyer in a truancy proceeding is to hold the school accountable for its role in addressing the child's attendance problems, ensure fair treatment of the child, help the child articulate the underlying reasons for her nonattendance, and improve the chances for a positive change in the child's school attendance.

V. CONCLUSION

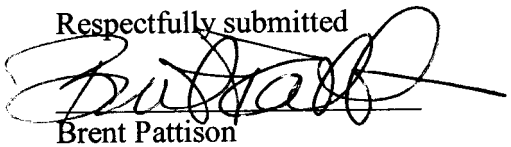
Appointment of counsel is required by due process. It will also lend the truancy process needed legitimacy. As one commentator noted:

> Appointing counsel allows the vulnerable to present their best arguments to decision makers whose authority is backed by the coercive power of the state. It reduces the risk of an arbitrary decision. Appointment of counsel increases the likelihood of an outcome consistent with the child's expressed preferences by partially redressing the imbalance of power between children and the adults who make decisions about them. Appointing counsel thus simultaneously enhances the likelihood of a just decision and the integrity of the justice system.

Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996). *Amici* respectfully urge the court to uphold the Court of Appeal's decision and find that counsel is required by due process in any truancy hearing.

DATED this 18th day of December, 2009

Respectfully submitted



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