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COURT OF APPEALS NO. 60528-3-I  
SUPREME COURT NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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**FILED**  
APR 28 2009  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

BELLEVUE SCHOOL DISTRICT,

Petitioner,

v.

E.S.,

Respondent.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 APR 28 PM 4:38  
*[Signature]*

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**STATE'S PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

The Bellevue School District, represented by the King County Prosecuting Attorney, seeks review of the published opinion filed in Bellevue School Dist. v. E.S., 148 Wn. App. 205, 199 P.3d 1010 (January 12, 2009). See Appendix A. A timely motion for reconsideration was filed by the State (hereinafter Motion to Reconsider). That motion was denied in an order dated March 25, 2009. See Appendix B.

B. ISSUE PRESENTED

Does the Due Process Clause of the U.S. Constitution require appointment of counsel for a juvenile upon the first appearance in court following the filing of a truancy petition pursuant to RCW 28A.225.030(1), before the juvenile faces any imminent risk of deprivation of physical liberty?

C. STATEMENT OF THE CASE

E.S., a juvenile who was enrolled in the Bellevue School District, missed 73 of the first 100 days of the 2005 - 2006 academic school year, approximately three-quarters of the scheduled school days up to that point in the year. RP 3/6/06 at 3.

The Bellevue School District filed a truancy petition pursuant to RCW 28A.225.030. Eight months later, in November, 2006, following numerous failed attempts to convince E.S. to return to school, the superior court appointed E.S. legal counsel because contempt sanctions were being considered. Several additional hearings were held but E.S. still would not attend school.

Eventually, counsel for E.S. moved to dismiss the truancy petition on the grounds that counsel should have been appointed immediately upon filing of the truancy petition. In June, 2007, the superior court denied E.S.'s motion, citing In re Truancy of Perkins, 93 Wn. App. 590, 969 P.2d 1101, review denied, 138 Wn.2d 1003 (1999), a case in which the Court of Appeals held that the Due Process Clause does not require appointment of counsel in the earliest stages of a truancy petition.

E.S. appealed, and the Court of Appeals held that the Due Process Clause of the U.S. Constitution requires appointment of counsel at the first hearing following the filing of a truancy petition. Bellevue School District v. E.S., 148 Wn. App. at 211-20. The court reasoned that E.S.'s liberty, privacy, and educational interests were jeopardized by the truancy action, such that counsel was required at any hearing. The court's decision abrogated its earlier decision

in In re Perkins on the basis that the Perkins court had not considered relevant U.S. Supreme Court authority. Id. at 212-13. Reconsideration was denied.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Washington truancy statutes require appointment of counsel for truants when a superior court believes that it might consider contempt sanctions for failure to comply with the court's orders. The Court of Appeals decision in this case holds that the U.S. Constitution requires appointment of counsel at the earliest stages of a truancy case, even though neither the filing of a petition nor the first hearing places a juvenile in imminent risk of a deprivation of physical liberty. The Court of Appeals' decision, thus, mandates appointment of counsel much earlier in the proceedings than was previously understood under existing precedent from this Court and the U.S. Supreme Court.

The decision has caused a great deal of uncertainty in how to administer and fund the existing truancy program. A decision by this Court is needed to assess the propriety of the Court of Appeals' ruling and, if affirmed, to set the legal parameters of this new right to counsel. Without such a decision from this Court, legislators will

be unsure whether, or how, the law needs to be modified, and superior courts, counties, school districts, and prosecutors will continue to operate under a cloud of uncertainty regarding the precise scope of the right to counsel in juvenile civil proceedings.

Thus, the E.S. decision meets all of the criteria under RAP 13.4(b)(1)-(4).<sup>1</sup> The decision conflicts with this Court's opinions and decisions of the United States Supreme Court, it abrogated -- and, thus, conflicts with -- a long-standing Court of Appeals decision, it concerns a significant question under the U.S. Constitution, and it involves an issue of substantial public interest that should be decided by this Court.

1. E.S. CONFLICTS WITH DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

RAP 13.4(b)(1) provides that review is warranted if the Court of Appeals decision conflicts with a decision of the Supreme Court. This Court's decisions regarding the scope of a due process right to

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<sup>1</sup> RAP 13.4(b) provides: "Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

counsel derive from decisions of the U.S. Supreme Court. E.S. conflicts with those decisions.

First, the decision conflicts with binding precedent from the U.S. Supreme Court. E.S. held that due process mandates appointed counsel because liberty, privacy and educational interests are potentially at stake. The decision was based on Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (discussing Due Process requirements for an administrative hearing on termination of disability rights). Regarding the liberty interest in E.S., the court tacitly acknowledged that a juvenile's liberty interest in the early stages of a truancy petition is not as great as had been recognized in cases where lawyers were required. Still, the court held that, because "[a] truancy order is a necessary and direct predicate to a later finding of contempt and imposition of a detention sanction," and because juveniles are less able to defend themselves than adults, lawyers are constitutionally required at the first hearing even though there is only an indirect threat to liberty at that stage. E.S., at 213-15. Essentially, the Court of Appeals held that juveniles have elevated due process rights because of their status as juveniles.

Supreme Court precedent, however, has established a presumption that due process does not require counsel in a civil proceeding unless there is a direct threat to physical liberty. And, the Supreme Court has held that juveniles have fewer liberty interests than adults. The E.S. decision conflicts with these principles.

"The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). The deprivation of physical liberty cannot be merely potential or hypothetical, it must be actual. Even in a criminal case, a defendant is not entitled to counsel unless she faces "actual imprisonment" or an actual "loss of personal liberty." Lassiter, 452 U.S. at 26. "[T]he mere threat of imprisonment" is not enough to require counsel. Id. (citing Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979)). Moreover, "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." Id. (citing Gagnon v. Scarpelli, 411 U.S. 778,

93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973) and Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (probationers have a lesser liberty interest so no automatic right to counsel)). Id. at 26-27. There is a presumption that counsel is not warranted unless physical liberty is in peril, and the Mathews v. Eldridge factors must be weighed against this presumption. Id.

The E.S. decision also conflicts with precedent from this Court, which has also held that counsel is required only where physical liberty is threatened. See, e.g., In re Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) ("In civil cases, the constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened"). This Court has distinguished, in a case involving an adult's asserted right to counsel in a child support proceeding, between threatened and actual loss of liberty:

The threat of imprisonment upon which we hold the right to counsel turns must be immediate. *The mere possibility that an order in a hearing may later serve as the predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance.* Thus the state need not furnish counsel to defendants in child support suits which may subsequently result in orders the violation of which would be contemptuous.

Tetro v. Tetro, 86 Wn.2d 252, 255 n.1, 544 P.2d 17 (1975) (italics added). See also King v. King, 162 Wn.2d 378, 394-96, 174 P.3d 659 (2007) (no due process right to counsel in dissolution proceeding because liberty is not threatened).

Also, the Supreme Court has recognized that when it comes to protecting children from self-destructive behaviors, children have lesser liberty interests than adults.

The juvenile's ... interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial. . . . But that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. . . . Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's "*parens patriae* interest in preserving and promoting the welfare of the child."

Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (citations omitted) (holding that juveniles may be held in pretrial detention based on a finding that they are likely to commit future crimes and endanger themselves).

Juveniles ordinarily have *fewer* rights than adults in other areas, too. For instance, juveniles do not have a right to counsel in

school disciplinary proceedings. Goss v. Lopez, 419 U.S. 565, 583, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). Juveniles have no right to counsel in a voluntary civil commitment instituted by a parent. Parham v. J.R., 442 U.S. 584, 604-09, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). And juveniles have no right to a jury trial in criminal proceedings. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Thus, the Court of Appeals' decision conflicts with binding precedent from this Court and the U.S. Supreme Court regarding the liberty interest of juveniles that will trigger a right to counsel in a civil case. Review is appropriate pursuant to RAP 13.4(b)(1) and (3).

The Court of Appeals also held that privacy interests and educational interests of students may be implicated by the filing of a truancy petition, such that lawyers are required to protect those interests. But, as the State argued in its motion to reconsider, such interests have never before been held to require appointment of counsel under the Due Process Clause, and it is far from clear, in any event, that appointment of counsel would advance those interests. Motion to Reconsider at 23-27.

2. WHETHER OR WHEN DUE PROCESS REQUIRES A LAWYER IS A SIGNIFICANT QUESTION OF LAW UNDER THE UNITED STATES CONSTITUTION.

Under RAP 13.4(b)(3), review is appropriate where the Court of Appeals decision raises a significant constitutional question. The question presented in the case is certainly an important and novel constitutional issue. As described above, it has traditionally been understood that counsel is required in a civil case only where there is an imminent threat to physical liberty. The E.S. decision changes that calculus. As one lawyer for E.S. put it immediately after the Court of Appeals decision was filed:

'If it stands, the decision could make Washington the first state in which a juvenile is entitled to counsel at the outset of court truancy proceedings that could lead to penalties,' said Paul Holland, director of the Ronald A. Peterson Law Clinic at Seattle University, which represented the girl in the case. 'I am not aware of any states that provide lawyers at the initial stage of truancy proceedings,' Holland said.

[http://seattlepi.nwsourc.com/local/395729\\_truancy13.html](http://seattlepi.nwsourc.com/local/395729_truancy13.html) (last visited 4/14/09). Thus, counsel for E.S. apparently agrees that this constitutional issue is significant. Review is appropriate under RAP 13.4(b)(3).

3. E.S. CONFLICTS WITH A PRIOR APPELLATE COURT DECISION.

RAP 13.4(b)(2) provides that review is appropriate if the decision of the Court of Appeals conflicts with another decision of the Court of Appeals. The rule by its terms applies to conflicts between decisions in a single division of the Court of Appeals as well as to conflicts across divisions.

In re Perkins held that there was no due process right to counsel at a truancy hearing; E.S. held that there is such a right. The two decisions are irreconcilable.

And, as argued in the State's motion to reconsider, the Court of Appeals should not have overturned its own precedent without first finding that its prior decision was incorrect and harmful. Neither the law nor circumstances have changed since the Perkins decision. Motion to Reconsider at 8-12. There was simply no reason to abandon it, especially where it comported with Supreme Court precedent. The Court of Appeals stated, however, that Perkins was distinguishable because the court in Perkins had not considered Mathews v. Eldridge. E.S., at 212. But, the Mathews v. Eldridge analysis was cited by the appellant in Perkins. See Motion to Reconsider at 8-9. The Perkins court evidently did not find

Eldridge controlling, since it did not concern the right to counsel or juveniles, and thus the Perkins court did not rely on Eldridge. This is no basis upon which to abrogate the prior decision.

In any event, since E.S. abrogates Perkins, the conflict is evident. Review is appropriate under RAP 13.4(b)(2).

4. WHEN TRUANTS MUST BE PROVIDED WITH LAWYERS IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

RAP 13.4(b)(4) provides that review is warranted if the issue is one of "substantial public interest that should be determined by the Supreme Court." This issue is of substantial public interest.

The public and the legislature clearly have a substantial interest in whether a lawyer must be publicly funded each time a truancy petition proceeds to a hearing. Indeed, long before E.S. was filed the legislature ordered a study of the effectiveness and cost of state truancy programs. See Tali Lima, Marna Miller & Corey Nunlist, *Washington's Truancy Laws: School District Implementation and Costs*, Washington State Institute for Public Policy, Document No. 09-02-2201 (February, 2009).<sup>2</sup> It is estimated that "[s]tatewide, 18 percent of youth with a truancy

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<sup>2</sup> Available at <http://www.wsipp.wa.gov/rptfiles/09-02-2201.pdf>.

petition have at least one subsequent contempt motion filed." Id. at 8. The state provides a total of \$1.8 million per year to the 295 school districts in Washington to fund truancy prevention programs. But, district costs are estimated to run at 1.5 times that amount, or \$ 2.7 million per year. Id. at 10-12. If lawyers must be provided for each case where a hearing is ordered, instead of the relatively few cases that proceed to the contempt stage, it is reasonable to assume that costs will rise significantly. And, adding lawyers to truancy actions may not increase student attendance. Thus, costs will rise with no assurance of a better return on those costs.

A decision by this Court is needed to resolve the constitutional question. Trial courts are left in disarray after the E.S. decision because there is no funding stream -- federal, state or county -- that will permit appointment of lawyers in the thousands of pending truancy cases. Of course, if the Constitution requires counsel, cost is not a reason to withhold counsel. But cost certainly influences legislative judgments on how to address a societal problem, and truancy is no exception. It is unclear whether the legislature would choose to continue the existing truancy program with the added cost of counsel. It is quite clear, however, that trial courts and counties will be hard-pressed to provide counsel based

on the E.S. decision. A decision from this Court regarding the scope of the right to counsel is needed.

Moreover, the legislature will be constrained in its ability to amend the existing truancy statutes until a final decision has been issued by this Court, because the legislature cannot act until it knows the exact parameters of the legal right to counsel as described by this Court.

E. CONCLUSION

The E.S. decision expands the constitutional right to counsel in a civil truancy proceeding beyond what was previously required by caselaw. Because the decision is mistaken, conflicts with established precedent, and will continue to engender confusion, the criteria under RAP 13.4(b) are met. The State respectfully asks that review be granted.

DATED this 16<sup>th</sup> day of April, 2009.

Respectfully submitted,

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# **APPENDIX A**

Westlaw.

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 148 Wash.App. 205, 199 P.3d 1010, 240 Ed. Law Rep. 925  
 (Cite as: 148 Wash.App. 205, 199 P.3d 1010)

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Court of Appeals of Washington,  
 Division 1.  
 BELLEVUE SCHOOL DISTRICT, Respondent,  
 v.  
 E.S., Appellant.  
 No. 60528-3-I.

Jan. 12, 2009.

**Background:** School district filed a truancy petition against child. The Superior Court, King County, Patricia H. Clark, J., signed an order requiring child to attend school on a regular basis and subsequently found her in contempt and ruled that child had no right to counsel at the initial hearing. Child appealed.

**Holding:** The Court of Appeals, Ellington, J., held that due process demands that child be represented in the initial truancy hearing; abrogating *In re Truancy of Perkins*, 93 Wash.App. 590, 969 P.2d 1101.

Reversed.

West Headnotes

## [1] Schools 345 ↪ 161

345 Schools  
 345II Public Schools  
 345II(L) Pupils  
 345k161 k. Truants and Truant Officers and Schools. Most Cited Cases  
 Whether due process required that a child be provided counsel in an initial truancy hearing was a question of law, and review was de novo. U.S.C.A. Const.Amend. 14.

## [2] Constitutional Law 92 ↪ 4212(1)

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(G) Particular Issues and Applica-

tions

92XXVII(G)8 Education  
 92k4204 Students  
 92k4212 Notice and Hearing; Proceedings and Review  
 92k4212(1) k. In General. Most Cited Cases

## Schools 345 ↪ 161

345 Schools  
 345II Public Schools  
 345II(L) Pupils  
 345k161 k. Truants and Truant Officers and Schools. Most Cited Cases  
 Child's interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and child is unable to protect these interests herself, and thus, due process demands that child be represented in initial truancy hearing; initial truancy hearing provides no procedural safeguards to protect the child's rights, and it is undeniable that the child cannot be expected to protect them herself, and representation is required to ensure that child understands her rights and consequences of a truancy finding, that school district is held to its statutory duties and standard of proof, and to ensure that child can respond to any suggested changes in her education program; abrogating *In re Truancy of Perkins*, 969 P.2d 1101. U.S.C.A. Const.Amend. 14.

## [3] Schools 345 ↪ 161

345 Schools  
 345II Public Schools  
 345II(L) Pupils  
 345k161 k. Truants and Truant Officers and Schools. Most Cited Cases  
 A truancy order is a necessary and direct predicate to a later finding of contempt and imposition of a detention sanction, and at the point of contempt proceedings, no challenge to the original truancy finding is available.

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[4] Contempt 93 ↪ 20

93 Contempt

93I Acts or Conduct Constituting Contempt of Court

93k19 Disobedience to Mandate, Order, or Judgment

93k20 k. In General. Most Cited Cases

In any kind of case, a party who disregards a court order may be subject to contempt sanctions.

[5] Infants 211 ↪ 46

211 Infants

211IV Contracts

211k46 k. Capacity to Contract. Most Cited Cases

Infants 211 ↪ 70

211 Infants

211VII Actions

211k70 k. Capacity to Sue and Be Sued in General. Most Cited Cases

Children cannot sign legally binding contracts, or bring lawsuits, or otherwise involve themselves in legal proceedings. West's RCWA 26.28.015.

[6] Infants 211 ↪ 49

211 Infants

211IV Contracts

211k49 k. Services. Most Cited Cases

Infants 211 ↪ 205

211 Infants

211VIII Dependent, Neglected, and Delinquent Children

211VIII(D) Proceedings

211k205 k. Counsel or Guardian Ad Litem. Most Cited Cases

A child cannot hire an attorney, and a child under the age of twelve cannot waive the right to counsel in criminal matters in juvenile court. U.S.C.A. Const.Amend. 6; West's RCWA 13.40.140(10).

[7] Constitutional Law 92 ↪ 3886

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3878 Notice and Hearing

92k3886 k. Counsel. Most Cited Cases

When a party lacks the capacity to represent his or her interests in proceedings brought against them by governing authorities, due process requires that counsel be appointed. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 ↪ 3886

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3878 Notice and Hearing

92k3886 k. Counsel. Most Cited Cases

For purposes of due process, the issue regarding appointment of counsel is whether the party has the mental capacity to represent his or her interests before the court. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ↪ 3875

92 Constitutional Law

92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General

92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases

Financial cost, alone, is not a controlling weight in determining whether due process requires a particular procedural safeguard. U.S.C.A. Const.Amend. 14.

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John Folkman, University of Washington School of Law, Tulalip, WA, Amicus Curiae on behalf of Team Child.

Sarah A. Dunne, ACLU, Nancy Lynn Talner, Attorney at Law, Seattle, WA, Amicus Curiae on behalf of American Civil Liberties Union of Washington.

ELLINGTON, J.

\*207 ¶ 1 A proceeding to declare a child truant affects the child's rights to liberty, privacy, and education. Due process requires that the child be afforded counsel.

### BACKGROUND

#### *Truancy Law and Procedure*

¶ 2 In Washington, school is compulsory for children aged eight to eighteen.<sup>FN1</sup> Under the legislative amendments passed as part of the Becca Bill <sup>FN2</sup> in 1995, schools must take steps to help \*208 ensure attendance.<sup>FN3</sup> AFTER A CHILD'S FIRST unexcused absence, schools must notify parents and inform them of the consequences of further absences.<sup>FN4</sup> After two unexcused absences in one month, the school must schedule a meeting with the parent and child to analyze the cause,<sup>FN5</sup> and must then "[t]ake steps to eliminate or reduce the child's absences."<sup>FN6</sup> If a child has seven or more unexcused absences within any month or ten or more unexcused absences in the current school year and actions taken by the school district have not substantially reduced the child's absences, the district is required to file a truancy petition seeking intervention by the court.<sup>FN7</sup> If the district fails to file a petition, the child's parent may do so.<sup>FN8</sup>

FN1. RCW 28A.225.010. Exceptions to the mandatory attendance rule include children who are being homeschooled, children unable to attend school for serious health issues, children attending approved education centers, and children who are

sixteen years old and lawfully employed. See RCW 28A.225.010(1)(a)-(e).

FN2. Laws of 1995, ch. 312.

FN3. RCW 28A.225.020.

FN4. RCW 28A.225.020(1)(a).

FN5. RCW 28A.225.020(1)(b).

FN6. RCW 28A.225.020(1)(c).

FN7. RCW 28A.225.030(1).

FN8. RCW 28A.225.030(4).

¶ 3 The juvenile court must then schedule a hearing to consider the petition.<sup>FN9</sup> A child over the age of eight may be compelled to attend.<sup>FN10</sup> The child and his or her parents have a right to notice of the hearing, to present evidence, and to be advised of the "options and rights available under chapter 13.32A RCW."<sup>FN11</sup>

FN9. RCW 28A.225.035(4). If the court determines that referral to a community truancy board is appropriate, the court may make the referral as an alternative to a hearing. *Id.* A hearing may be dispensed with if "other actions by the court would substantially reduce the child's unexcused absences." RCW 28A.225.035(8).

FN10. RCW 28A.225.035(9).

FN11. RCW 28A.225.035 (8).

¶ 4 Of particular note here, the statute provides that "[t]he court may permit the first hearing to be held without requiring that either party be represented by legal counsel, and to be held without a guardian ad litem for the child."<sup>FN12</sup>

FN12. RCW 28A.225.035(11).

\*209 ¶ 5 If allegations in the petition are proven by a preponderance of the evidence, the court may

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enter an order “assuming jurisdiction to intervene,”  
<sup>FN13</sup> and may order the child to attend school, to  
 change schools, to appear before a community truancy  
 board, or to submit to drug and/ or alcohol  
 testing.<sup>FN14</sup>

FN13. RCW 28A.225.035(12).

FN14. RCW 28A.225.090(1).

¶ 6 The district must report any further **\*\*1012** unexcused absences to the court.<sup>FN15</sup> The child's failure to comply with the order may result in contempt sanctions, and “the court may order the child to be subject to detention.”<sup>FN16</sup> At the point of contempt proceedings, counsel is appointed for the child.<sup>FN17</sup>

FN15. RCW 28A.225.035(13).

FN16. RCW 28A.225.090(2) (court may order the child to be subject to detention “as provided in RCW 7.21.030(2)(e),” which is the juvenile contempt statute).

FN17. *See Tetro v. Tetro*, 86 Wash.2d 252, 255, 544 P.2d 17 (1975) (“wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation”).

#### FACTS

¶ 7 In March 2006, when E.S. was thirteen years old, the Bellevue School District (the District) filed a truancy petition against her. The juvenile court duly scheduled an initial hearing. Present were E.S., her mother, the District's truancy coordinator, and a Bosnian language interpreter. The court began by asking the truancy coordinator whether this was an agreed matter. He indicated it was. The court advised E.S. and her mother that they had a right to a hearing, described what it would entail, and asked whether each “agree[d] that there should

be a court order in place.”<sup>FN18</sup> They agreed. The court advised them that the order would be in place for a year; that if E.S. failed to go to school, the District could bring a motion for contempt; and that sanctions for contempt could include evaluations, community **\*210** service, book reports, house arrest, work crew, and detention. E.S. promised to go to school every day for the rest of the school year.

FN18. Report of Proceedings (Mar. 6, 2006) at 3.

¶ 8 The court signed an order requiring E.S. to attend school on a regular basis. The order provided that “[f]ailure to obey this Court order will subject the parties to sanction which may include monetary fines, community service, or detention.”<sup>FN19</sup>

FN19. Clerk's Papers at 16.

¶ 9 E.S. continued to miss school. In November 2006, the District brought a motion for contempt. E.S. was appointed counsel. The court found her in contempt and sanctioned her with two days of work crew, which could be purged if she completed an essay describing how she could be successful in school. At a January 2007 review hearing, the court found she had not purged her contempt and ordered her to enroll at an alternative school and to have no further absences. E.S. had not purged her contempt by the next hearing, and the court ordered her to attend school with no further absences and collect her missing homework, or she would be placed on electronic home monitoring. In March 2007, the court directed E.S. to attend school and to attend mental health counseling. At a second hearing that month, the court ordered E.S. to attend school with no unexcused absences or tardies, and gave notice that failure to comply would result in a sanction of electronic home monitoring.

¶ 10 In May 2007, E.S.'s substitute counsel moved to set aside the truancy finding, contending both that E.S. should have been provided counsel at the preliminary hearing and that the original petition was legally insufficient.<sup>FN20</sup> The court commis-

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sioner ruled that E.S. had no right to counsel at the initial hearing and that the District had met all statutory requirements, continued the contempt review hearing until October 2007, and ordered that if E.S. had perfect attendance until then, contempt would be purged. \*211 E.S.'s motion for revision of the commissioner's ruling was denied.

FN20. The District does not contend this challenge was untimely.

#### DISCUSSION

[1][2] ¶ 11 E.S. and amici <sup>FN21</sup> contend that to satisfy due process, the child subject to a truancy petition must be afforded counsel at the initial proceeding. Whether due process requires that a child be provided counsel in \*\*1013 an initial truancy hearing is a question of law. Review is de novo.<sup>FN22</sup>

FN21. The court received amicus briefs from TeamChild and the American Civil Liberties Union of Washington.

FN22. *In re Truancy of Perkins*, 93 Wash.App. 590, 593, 969 P.2d 1101 (1999).

#### Mootness

¶ 12 This matter is technically moot, but we consider it as a matter of substantial public interest.<sup>FN23</sup> The issue is certain to recur and, given the timelines involved, equally certain to evade review. An authoritative determination is therefore necessary to guide courts in future proceedings.<sup>FN24</sup>

FN23. *See Detention of McLaughlin*, 100 Wash.2d 832, 838, 676 P.2d 444 (1984) (an issue involves a substantial public interest and should be considered, although moot, when it is of a public nature, will likely recur, and requires an authoritative determination to provide future guidance

to public officers).

FN24. *Id.*

#### Due Process Right to Counsel

¶ 13 This issue has arisen before, under somewhat different circumstances. We recently decided *In re Truancy of Perkins*,<sup>FN25</sup> which involved two sisters, each of whom had been adjudicated truant in hearings without counsel.<sup>FN26</sup> Each failed to comply with the order to attend school, and the school district filed contempt motions. Counsel was \*212 appointed. The court found both girls in contempt and sentenced them to detention, suspended upon compliance with the truancy order. Compliance was not forthcoming, and several review hearings later, the girls had each served time in detention. The girls contended the truancy statute is unconstitutional because it does not mandate appointment of counsel at the initial hearing.<sup>FN27</sup>

FN25. *Id.*

FN26. *Id.* at 592, 969 P.2d 1101.

FN27. *Id.* at 594, 969 P.2d 1101.

¶ 14 Relying principally on the fact that a court may not order a child into detention at the initial hearing, the *Perkins* court upheld the statute. The focus of our opinion was whether a child's interest in avoiding a court order to attend school, change schools, or be referred to a community truancy board was comparable to the interests at stake in civil cases in which the right to counsel has been recognized.<sup>FN28</sup> The *Perkins* court found the interests not comparable to those at stake in *In the Matter of Welfare of Luscier*, 84 Wash.2d 135, 139, 524 P.2d 906 (1974) (parent in proceeding to terminate parental rights entitled to appointed counsel); *In re Welfare of Myricks*, 85 Wash.2d 252, 255, 533 P.2d 841 (1975) (parent entitled to appointed counsel in a dependency proceeding that only temporarily removes a child from the parent but has a substantial likelihood of eventually lead-

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ing to termination of parental rights); and *State v. Santos*, 104 Wash.2d 142, 147-48, 702 P.2d 1179 (1985) (child has a fundamental interest in knowing its parentage and is thus entitled to representation in paternity proceedings).<sup>FN29</sup>

FN28. *Id.* at 595, 969 P.2d 1101.

FN29. *Id.* at 594-96, 969 P.2d 1101.

¶ 15 The *Perkins* court did not undertake (and was apparently not asked to undertake) the *Mathews v. Eldridge*<sup>FN30</sup> analysis of due process requirements. The parties here direct their arguments to the *Mathews* test: balancing the private interests affected by the proceeding; the risk of error caused by the procedures used, and the probable value, if any, of additional or substitute procedural \*213 safeguards, and the countervailing governmental interest supporting the use of the challenged procedure.<sup>FN31</sup> We undertake that balancing here, and reach a different result from that we reached in *Perkins*.

FN30. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

FN31. *Id.* at 335, 96 S.Ct. 893.

#### *Interests at Stake*

¶ 16 Truancy hearings are the only type of proceeding, civil or criminal, in which a juvenile respondent is not provided counsel.<sup>FN32</sup> \*\*1014 E.S. contends these hearings affect three constitutionally protected interests: liberty, privacy, and the right to education.

FN32. See RCW 13.34.100(6) (counsel for children twelve or older in a dependency); RCW 13.32A.192(1)(c) (at-risk youth); RCW 13.32A.160(1)(c) (child in need of services); *Application of Gault*, 387 U.S. 1, 36-37, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (children in criminal cases require “the guiding hand of counsel at every step

of the proceedings against him’ ”) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

[3] ¶ ~~17~~ ~~Liberty~~ A truancy order is a necessary and direct predicate to a later finding of contempt and imposition of a detention sanction. At the point of contempt proceedings, no challenge to the original truancy finding is available.<sup>FN33</sup>

FN33. See *In the Matter of J.R.H.*, 83 Wash.App. 613, 616, 922 P.2d 206 (1996) (“ ‘a court order cannot be collaterally attacked in contempt proceedings arising from its violation, since a contempt judgment will normally stand even if the order violated was erroneous or was later ruled invalid’ ”) (quoting *State v. Coe*, 101 Wash.2d 364, 369-70, 679 P.2d 353 (1984)).

[4] ¶ 18 In any kind of case, a party who disregards a court order may be subject to contempt sanctions.<sup>FN34</sup> As the court noted in *Perkins*, this fact does not create a right to counsel at the time of an initial order. In *Tetro v. Tetro*,<sup>FN35</sup> for example, the Supreme Court rejected a parent's contention that he had a right to appointed counsel in a child support proceeding because violation of the resulting order could lead to contempt sanctions including incarceration: “The \*214 mere possibility that an order in a hearing may later serve as a predicate for a contempt adjudication is not enough to entitle an indigent party therein to free legal assistance.”<sup>FN36</sup>

FN34. RCW 2.28.020. See, e.g., *Yamaha Motor Corp., U.S.A. v. Harris*, 29 Wash.App. 859, 865-66, 631 P.2d 423 (1981) (“court may use its inherent contempt power to coerce compliance with its lawful order”).

FN35. 86 Wash.2d 252, 544 P.2d 17 (1975).

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FN36. *Id.* at 255 n. 1, 544 P.2d 17.

¶ 19 The District takes the position that there is no difference, for purposes of due process, between a child support proceeding and a truancy hearing. We think, however, there is a critical distinction. In a child support suit—indeed, in all other proceedings in which parties represent themselves before the court—the parties are adults. Adults are legally independent and are presumed capable of understanding the proceedings. Adults have the right to retain counsel, and should they decide not to do so, they are presumed able to represent their own interests. Indeed, adults representing themselves are held to the standard of an attorney.<sup>FN37</sup> To prepare, adults can take advantage of multiple resources for learning about the court system, its procedures, and the applicable law. Adults can also seek help at legal clinics.

FN37. See *Westberg v. All-Purpose Structures Inc.*, 86 Wash.App. 405, 411, 936 P.2d 1175 (1997) (“pro se litigants are bound by the same rules of procedure and substantive law as attorneys”).

[5][6] ¶ 20 In a truancy proceeding, on the other hand, the respondent is a child, who may be as young as eight years old. A child is neither independent nor capable, in fact or in law. Children “lack the experience, judgment, knowledge and resources to effectively assert their rights.”<sup>FN38</sup> Children cannot sign legally binding contracts, or bring lawsuits, or otherwise involve themselves in legal proceedings.<sup>FN39</sup> A child cannot hire an attorney. A child under the age of twelve cannot waive the right to counsel in criminal matters in juvenile court.<sup>FN40</sup> And children between eight and twelve years of age are presumed incapable of committing a crime, because they are \*215 presumed not to understand the act, to know it was wrong, or to understand the consequences.<sup>FN41</sup>

FN38. *DeYoung v. Providence Med. Ctr.*, 136 Wash.2d 136, 146, 960 P.2d 919 (1998). Additionally, a civil judgment

against a child is voidable at his option. *Newell v. Ayers*, 23 Wash.App. 767, 771, 598 P.2d 3 (1979).

FN39. RCW 26.28.015.

FN40. RCW 13.40.140(10).

FN41. RCW 9A.04.050.

¶ 21 These disadvantages are not mitigated by the presence of the child's parent in truancy proceedings. In many cases, the child and parent may have opposing interests. Indeed, the statute allows a parent to initiate the proceeding.<sup>FN42</sup> And the parent is subject to a possible fine if she fails to exercise reasonable diligence to ensure her child's \*\*1015 school attendance.<sup>FN43</sup> Further, as the presence of an interpreter in this case illustrates, many parents are themselves ill equipped to navigate the court system.

FN42. RCW 28A.225.030(4).

FN43. RCW 28A.225.090(3).

¶ 22 The law treats children differently from adults for very good reasons. Expecting a child to represent herself in truancy proceedings is to expect her to exercise judgment the law presumes she does not have, in a proceeding that may lead to her incarceration.

[7] ¶ 23 When a party lacks the capacity to represent his or her interests in proceedings brought against them by governing authorities, due process requires that counsel be appointed. Our Supreme Court made this clear in two cases involving lawyer discipline, holding that when an attorney is not mentally capable of representing himself or herself in such proceedings, due process requires that the attorney be represented by counsel.<sup>FN44</sup>

FN44. See *In the Matter of Disability Proceeding Against Diamondstone*, 153 Wash.2d 430, 447, 105 P.3d 1 (2005); *In the Matter of Disciplinary Proceeding*

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*Against Meade*, 103 Wash.2d 374, 383,  
 693 P.2d 713 (1985).

[8] ¶ 24 For purposes of due process, the issue is whether the party has the mental capacity to represent his or her interests before the court. Children do not have that capacity. And in all other juvenile proceedings, the child's interests are protected by counsel.

P.216 ¶ 25 Privacy. Children have a right to bodily privacy.<sup>FN45</sup> But the truancy court can order a child to submit to drug and/or alcohol testing based upon its determination that such testing is "appropriate."<sup>FN46</sup> Nothing in the statute indicates when this might be. The child's bodily integrity is thus jeopardized where such an order may be entered without competent challenge.

FN45. *York v. Wahkiakum School Dist.*,  
 163 Wash.2d 297, 308, 178 P.3d 995 (2008).

FN46. RCW 28A.225.090(1)(e).

¶ 26 Education. The purpose of the truancy proceeding is to enhance and protect the child's right to education, so it may seem counterintuitive to suggest that the proceeding may in fact threaten that right. But the statute permits the court to order the child to change schools or to enroll in an alternative education program.<sup>FN47</sup> Transferring a child to a different school is a major step. 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 in fact available. Such decisions, made without challenge and intelligent debate, pose a risk to the child's right to education.<sup>FN48</sup>

FN47. RCW 28A.225.090(1)(b), (c).

FN48. The effectiveness of the truancy process in furthering the respondent child's education is far from clear. In a preliminary report in 2000, the Washington State Institute for Public Policy reported, "it

does not appear that the *filing* of a truancy petition increases the chances that a petitioned youth ... will stay in school. The petition *process*, however may have a deterrence effect among non-petitioned truant youth." MASON BURLEY, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, ASSESSING THE IMPACT OF WASHINGTON'S TRUANCY PETITION PROCESS: AN EXPLORATORY ANALYSIS OF THE SEATTLE SCHOOL DISTRICT (2000), [http://www.wsipp.wa.gov/rptfiles/Seattle Truancy. pdf](http://www.wsipp.wa.gov/rptfiles/Seattle%20Truancy.pdf). Another report concluded the truancy petition process results in statistically higher school enrollment. STEVE AOS, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, KEEPING THE KIDS IN SCHOOL: THE IMPACT OF THE TRUANCY PROVISIONS IN WASHINGTON'S 1995 "BECCA BILL" (2002), [http://www.wsipp.wa.gov/rptfiles/Becca Truancy. pdf](http://www.wsipp.wa.gov/rptfiles/Becca%20Truancy.pdf).

¶ 27 Risk of Error and Value of Additional Safeguards. The District contends there is little risk of error because of the safeguards in the prefiling process, to wit, the requirement that the District take steps to address the child's absences.

\*217 ¶ 28 This argument rests upon several unsupported assumptions: first, that the school has the time, resources, and ability to take effective steps to address the child's absences such that health issues or other special circumstances will be identified; second, that such steps will actually be taken in every case; and third, that these steps will be effective before the child's absences reach the number triggering the petition requirement.

\*\*1016 ¶ 29 The steps to address the child's absences from school are a necessary predicate to the truancy petition.<sup>FN49</sup> The District's failure to take such action is thus a defense to the petition (although the child will not likely know this). Regardless of the child's circumstances, the truancy

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petition is mandatory after a certain number of unexcused absences if the steps taken by the school have not substantially reduced the student's absences. And should the District fail to file a petition, the statute provides that a parent may file, in which case no steps may have been taken by the District at all.

FN49. See RCW 28A.225.020(c) (school must take steps to eliminate or reduce absences); RCW 28A.225.030(1) (district shall file truancy petition if actions taken under .020 are unsuccessful); RCW 28A.225.035(1) (petition must allege actions taken by school have not been successful); RCW 28A.225.035(12) (court will grant petition if allegations proven by preponderance of the evidence).

¶ 30 Most importantly, the prefiling requirements provide no protection against error after the petition is filed. In that regard, the District argues that the informality of the hearing minimizes any risk of error by allowing the parties to simply give their version of the story. This is a great deal to expect of a child. A courtroom is an intimidating place, even in less formal juvenile proceedings. Confronted and opposed not only by her school district but in many cases her own parent, a child is unlikely to be a good advocate for herself, regardless of formality. Children cannot be expected to understand words like "contempt" or "sanctions." (Below, the court made no inquiry as to whether E.S. understood those ideas.) Further, crowded calendars leave the court little time for exploring the circumstances of each \*218 case.<sup>FN50</sup> THE HEARING IN THIS matter lasted only a few minutes, and the child said very little beyond acknowledging that sometimes she did not go to school because of stomachaches.

FN50. As an outdated illustration, during the 1996-97 school year, school districts in Washington filed 12,094 truancy petitions. EDIE HARDING, MASON BURLEY, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, EVALUATING

THE "BECCA BILL" TRUANCY PETITION REQUIREMENTS: A CASE STUDY IN TEN WASHINGTON STATE SCHOOL DISTRICTS (1998) at 2, <http://www.wsipp.wa.gov/rptfiles/truantevals.pdf>.

¶ 31 Moreover, the underlying cause of a child's truancy may be something she is unwilling to explain to strange adults in open court despite informal hearing procedures. Family issues involving illness, domestic violence, substance abuse, poverty or homelessness, or issues at school involving abusive adults or bullying students are not subjects children can be expected to tell the court about, even if the child recognizes their relevance to her attendance record.<sup>FN51</sup> We are unpersuaded that lack of formality is a likely means of ensuring due process.

FN51. See MYRIAM BAKER, JANE NADY SIGMON, AND M. ELAINE NUGENT, U.S. DEPARTMENT OF JUSTICE, TRUANCY REDUCTION: KEEPING STUDENTS IN SCHOOL (2001) at 1, <http://www.ncjrs.gov/pdf-files/1/ojjdp/188947.pdf>.

¶ 32 Finally, the District suggests children are at no disadvantage because "the school district is not represented by an attorney, but usually a school district employee."<sup>FN52</sup> We are similarly unpersuaded by this distinction. The District is represented by an adult. The child is still a child. And while the District was not represented by an attorney at the initial hearing in this case, it acknowledges it consults with the prosecutor beforehand. Additionally, the District's counsel acknowledged at oral argument that in some counties, the prosecutor is in fact present and representing the District at every stage of the proceedings, including the initial truancy hearing. Further, the statute imposes duties upon children, parents, and schools. But only the child is subject to incarceration in case of failure to fulfill those duties. Parents may be fined; there is no \*219 penalty for a school district that fails in its duties. Yet it is the districts that have the benefit of public

counsel.

FN52. Br. of Resp't at 18.

¶ 33 This is not a portrait of equivalent advantages before the court.

¶ 34 The statute requires that before the court's intervention may be invoked, there will be a meaningful exploration of, and attempt to address, the causes of a child's truancy. Nothing in the present procedure ensures this will happen. The risk of error \*\*1017 is therefore high, and the consequences of error include lasting stigma and potential incarceration, as well as deepened alienation on the part of the child.

[10] ¶ 35 *Countervailing Government Interests*. Cost is the only countervailing interest identified by the District, which contends that appointing counsel for thousands of truancy hearings would impose an extreme burden on school districts.<sup>FN53</sup> E.S. and amici respond that even a small reduction in contempt proceedings and detention time could result in savings enough to balance the books. Without evidence on this point, we cannot evaluate either assertion.<sup>FN54</sup> Nor have we any evidence as to the existing public cost of providing advice and counsel to the school districts in these proceedings. In any case, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard."<sup>FN55</sup>

FN53. The appellant in her brief represented that there are more than 1,000 truancy cases per year in Pierce County alone.

FN54. If E.S. is correct that the petition was legally insufficient at the outset, appointment of counsel at the initial hearing would likely have prevented the expense of counsel at the many hearings that followed.

FN55. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

¶ 36 The initial truancy hearing provides no procedural safeguards to protect the child's rights, and it is undeniable that the child cannot be expected to protect them herself. Errors in the proceedings are therefore likely, and the risks to the child's liberty interests are great. Representation is required to ensure that the child understands\*220 her rights and the consequences of a truancy finding, that the district is held to its statutory duties and standard of proof, and to ensure that the child can explain her circumstances and respond to any suggested changes in her education program.

#### CONCLUSION

¶ 37 A child's interests in her liberty, privacy, and right to education are in jeopardy at an initial truancy hearing, and she is unable to protect these interests herself. Due process demands she be represented in the initial truancy hearing. Because counsel was not provided in this case, we vacate the finding of truancy.<sup>FN56</sup>

FN56. Given this resolution, we do not reach E.S.'s remaining claims concerning the adequacy of the petition or the failure of the court to engage in a case-specific inquiry as to the need for counsel.

¶ 38 Reversed.

WE CONCUR: COX and BECKER, JJ.  
 Wash.App. Div. 1,2009.  
 Bellevue School Dist. v. E.S.  
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## **APPENDIX B**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

BELLEVUE SCHOOL DISTRICT,	)	No. 60528-3-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
E.S.,	)	ORDER ON MOTION TO RECONSIDER,
	)	WITHDRAW OPINION, AND TRANSFER
	)	CASE TO THE SUPREME COURT
	)	
	)	

Respondent has filed a motion requesting this court to withdraw its opinion filed January 12, 2009 and transfer the case to the Washington Supreme Court, along with a motion for permission to file an overlength motion for reconsideration. Appellant then filed a motion to strike. The court requested an answer from appellant, which was filed February 23, 2009. After consideration of these matters, the court has determined and it is hereby

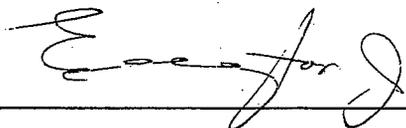
ORDERED that respondent's motion for permission to file an overlength motion for reconsideration is granted. It is further

ORDERED appellant's motion to strike the respondent's motion to withdraw the opinion and transfer the case to the Supreme Court is denied. It is further

ORDERED that respondent's motion to reconsider, withdraw the opinion and transfer the case to the Supreme Court is denied.

Done this 25<sup>th</sup> day of March, 2009.

FOR THE PANEL:

  
\_\_\_\_\_

FILED  
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STATE OF WASHINGTON  
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Certificate of Service by Mail

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel for E.S. and amici, containing a copy of the Petition for Review, in Bellevue School District v. E.S., Cause No. 60528-3-1, in the Court of Appeals for the State of Washington, Division I.

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name James M. Whisman  
Done in Seattle, Washington

4/14/09  
Date 4/16/09